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Supreme Court, U.S.

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

DAVID A. BOONE, et al.,
Petitioners,

VS.

REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HERBERT F. KAISER*
The Alcoa Building, Suite 1600
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 392-1184
Attorney for Petitioners
David A. Boone, et al.

* Counsel of Record

25 PP



QUESTIONS PRESENTED

This case presents the question whether anticompetitive activities by a Redevelopment Agency are protected by the state action exemption to the federal antitrust laws, when those activities are *expressly prohibited* by the State, which affirmatively does not authorize the displacement of competition and seeks action by unfettered private enterprise, and except for general authorizing legislation, the State does not supervise the anticompetitive conduct?

The associated question presented is whether a private developer violates antitrust laws by entering into a secret conspiracy with Redevelopment officials to restrain trade when those anticompetitive activities are *expressly prohibited* by the State?

LIST OF PARTIES

Petitioners are:

David A. Boone; Steven P. Fox; DSB-3 Group, a California Limited Partnership; Market/Post Ltd., a California Limited Partnership; Dave Goglio; Arnold Goglio; Three G's, a California Limited Partnership.

Respondents are:

Redevelopment Agency of the City of San Jose, a Body Corporate and Politic of the State of California; City of San Jose, a Municipal Corporation and Subdivision of the State of California; Frank Taylor, Executive Director of the Redevelopment Agency of the City of San Jose*; The Koll Company, a California Corporation.

* Frank Taylor was omitted from the published caption in the Ninth Circuit opinion, although he had been consistently previously named as a crucial defendant upon whom plaintiffs relied.

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OPINION BELOW

The opinion and judgment of the Court of Appeals is officially reported at 841 F.2d 886 (9th Cir. 1988), and appears in Appendix A to this petition. A-1-22.¹ The Memorandum Decision rendered by the United States District Court for the Northern District of California and San Jose appears in Appendix B at A-23-32. The Second Amended Complaint that was dismissed appears in Appendix C at A-33-65.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit was entered on March 1, 1988. This Petition For

¹ References to the Appendix are given in the following form: page 1 of the Appendix is referred to as "A-1", etc.

Writ Of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC § 1254(1).

STATUTES INVOLVED

This case involves the applicability of the Sherman Act, specifically 15 USC §§ 1 and 2, to the anticompetitive activities of the City's Redevelopment Agency acting in concert with a private developer to restrain trade, said activities being expressly prohibited by the State Legislature. Civil Rights Act 42 U.S.C. § 1983. The provisions of State law involved are: The California Community Redevelopment Act, Health and Safety Code, Sections 33032, 33037(a)(b), 33131(a), 33220(d), 33341, 33342, 33352, 33450, 33500; and California Constitution Article XIV, Section 6.

The pertinent provisions of the Sherman Act are set forth in Appendix L, A-186-188. The pertinent state statutes and constitutional provisions are set forth in Appendix L, A-188-199.

STATEMENT OF THE CASE

The Community Redevelopment Law of the State of California provides in Sections 33037 and 33342 (A-190, 192) for an essentially limitless and unsupervised authority for redevelopment agencies to do *anything* to redevelop blighted areas. However, this broad authority is repeatedly limited by the specific requirement that the Agency may act only when redevelopment cannot be accomplished by private enterprise acting alone [Health and Safety Code, Sections 33032, 33037(b) and 33352 (A-188, 189, 192)].

In this case the unanswered allegations of the complaint established that private enterprise acting alone had accomplished the redevelopment. In addition, the Redevelopment Agency (herein after "Agency") when it adopted the Amended Plan which ultimately was used to damage plaintiffs and support denial of plaintiffs antitrust claims, failed to have the mandated finding of blight required by the California authorizing statute (A-144-6, A-188).

Petitioners along with 4 other developers built office buildings in the Pueblo Uno Project Area of downtown San Jose pursuant to a Redevelopment Plan which expressly prohibited condemnation because private enterprise was expected to achieve the goals of redevelopment. (A-100) In fact, petitioners and other developers achieved the goals of the plan to alleviate and reverse blight.²

A critical provision and inducement to developers was for the Agency to provide adequate land and facilities for parking essential to the operation of the developers' businesses. Parking revenues would be generated by the developers using the Agency's facilities and the revenues would be used to provide additional parking as the phased development proceeded. (A-98, 99) The California Supreme Court in *City of Los Angeles v. Wolfe*, 6 C.3d 326, 336; 99 C.R. 21 (1971) has taken "*judicial notice of the fact of life that availability of parking facilities is essential to commercial enterprises in highly developed areas.*" (Emphasis added.)

In 1981 the petitioners were induced by the respondent Redevelopment Agency's Executive Director Frank Taylor, Downtown Coordinator Harry Mavrogenes, and Parking Coordinator Dennis Korbiak, to construct a \$56 million office building in the project area without adequate parking. (A-45, 49) Thereafter beginning with a secret agreement in 1982 and continuing thereafter at least through 1984 the Agency and certain of its officials³ conspired

² A-42; A-72-86, May 1985 photographs of successful private development of the project before the anticompetitive activities. A-70-71, photographs of Koll project with monopoly of all parking.

³ The Ninth Circuit Opinion stated on A-13 and 14 that the complaint failed to disclose the authority of the persons making the promises and participating in the conspiracy. The complaint named Frank Taylor, Executive Director of the Redevelopment Agency, although Ninth Circuit opinion on the title sheet did not name him as a defendant-appellee; the clerk's record on appeal, CR Docket No. 130, contained a copy of the State Court action naming in addition Harry Mavrogenes, Downtown Coordinator, and Dennis Korbiak, Parking Coordinator. (A-88-89) Thus the specific names of at least three of the top Agency officials were before that Court. Under the holding in *Conely v. Gibson*, 355 U.S. 42, 45-46, 78 S.Ct. 99 (1957) the Ninth Circuit knew of facts

with defendant The Koll Company ("Koll") to, through the anticompetitive activity of *condemnation and a monopoly* on local parking, (*Corey v. Look*, 641 F.2d 32, 37 (1st Cir. 1981)), gain a monopoly on all of the office space in the redevelopment area. (A-36-57) Pursuant to this conspiracy the named Agency officials repeated duped petitioners with false promises so that petitioners would continue construction activities on a building which would be economically unviable without parking and so that petitioners would do nothing to hinder the monopolizing plans of Koll. (A-51-56) In order to deceive petitioners not to oppose the amended plan, a provision in the amended plan provided that all developers would be given "adequate land for parking," although this was opposite to the true intent of the conspirators. (A-101) As a further deception, in order to prevent petitioners and other developers from protesting the adoption of the plan within the 60 days provided for in Health and Safety Code, Section 33500 (A-199), repeated false assurances were given by Taylor, Mavrogenes and Korbiak to petitioners that their parking needs would be provided in the peripheral garage. (A-51-56)

After the 60-day period had expired for petitioners or any other developer to protest the adoption of the Koll plan, Koll Company officials who had given illegal campaign contributions to City officials, went to the Agency officials, Taylor, Mavrogenes and Korbiak, (A-163-185) and demanded that petitioners and all other developers be prevented from using the parking facilities in the peripheral garage in order to destroy their businesses and predatorially acquire them. (A-55, 56) These Agency officials then refused to provide the essential parking in violation of the parking management ordinance passed on March 29, 1984 (A-52, 53, 102). As a result of this anticompetitive conspiracy, Koll has acquired two of the developers' buildings at distress prices and forced a third developer into bankruptcy and foreclosure and will acquire that building, and has also forced petitioner into a Chapter 11 proceeding and, therefore, Koll with its control of

in the record which would perfect petitioners' claims by amendment which they denied. A-22

parking facilities, will ultimately own the entire project. (A-130-158)

On December 12, 1984, petitioners filed their complaint (A-33 *et seq.*) in the United States District Court for the Northern District of California, sitting in San Jose, charging respondents with anticompetitive practices in violation of the Sherman Act and requesting damages and injunctive relief. (A-33 *et seq.*) Respondents raised the defense of State Action Immunity and Noerr-Pennington Immunity. Respondent Agency filed counterclaims against petitioners charging the antitrust offenses based upon the filing of this lawsuit which counterclaims are still pending.

Although the respondents were allowed full discovery, the District Court barred petitioners from any discovery (A-159, 160). After taking extensive discovery defendants moved for dismissal pursuant to Rule 12(b)(6). The District Court granted that motion, without leave to amend, relying in part on its clearly erroneous finding that petitioners had stipulated to the order staying discovery when in fact petitioners opposed the staying of discovery and the order so recites that the nature of the hearing was contested. (A-27, 159-160)

After a Rule 54(b) certification the matter was timely appealed to the Ninth Circuit Court of Appeals which found jurisdiction pursuant to 28 U.S.C. Section 1291. (A-1)

The Ninth Circuit affirmed the dismissal without leave to amend, in part relying on the erroneous finding that petitioners had failed to identify persons who had made false promises to them (A-15,16) and without comment on the bar to discovery imposed upon petitioners. (A-1-22)

Of crucial importance to the Ninth Circuit decision dismissing petitioners claims against the Agency was its significant extension of its own *Llewellyn* rule, (*Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985)), which held that minor errors by state officials did not vitiate state antitrust immunity. In this case when displacement of competition is not authorized the Ninth Circuit found that the "same concerns" provided immunity to Agency officials who directly violated state authorizing law prohibiting

displacement of competition and who, by such violation lost all authority pursuant to that law. (A-10)

In rejecting the possibility of petitioners *ever* pleading an anti-trust case against Koll the Ninth Circuit found that *Noerr-Pennington* immunity extended to a secret conspiracy to violate state law, to use a co-conspirator public official to make administrative and legislative actions a sham and prevented petitioners from judicial corrective remedies against the illegal plan by deceiving them until after the 60-day limitation period for attaching the plan had expired (A-51-56) (Health and Safety Code, Section 33500, A-199). It erroneously extended *Noerr-Pennington* doctrine by finding that even such secret backroom dealings which block rather than foster open communication with the government are to be granted immunity. The Ninth Circuit decision is completely erroneous.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT OPINION UNDERCUTS CLEARLY ESTABLISHED LAW LIMITING THE STATE ACTION ANTITRUST IMMUNITY TO ACTIONS AUTHORIZED BY A STATE AND EXTENDS SUCH IMMUNITY TO ACTIONS EXPRESSLY PROHIBITED BY THE STATE

While *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) extended a broad "state action" immunity to federal antitrust laws, such immunity was severely limited in such cases as *Cantor v. Detroit Edison*, 428 U.S. 579 (1976); *City of Lafayette, La. v. La. Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123 (1978); and *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 20 L.Ed.2d 810 (1982). Those cases developed the rule that actions by municipalities or other entities distinct from the states themselves were entitled to antitrust immunity *only* if the anticompetitive act was pursuant to a clearly articulated and affirmatively expressed state policy actively supervised by the state. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 25 (1985) made clear that active state supervision is not a prerequisite to municipi-

pality immunity and that the clear articulation requirement is met when anticompetitive effects logically result from the grant of authority.

The Ninth Circuit in *Llewellyn v. Crothers*, 765 F.2d 769 (1985) extended these rules by its holding that an authorizing law violation by a *state* official in carrying out a *state* legislative mandate did not vitiate the antitrust immunity since the action remained that of the state and a policy of regulation had been expressed in the authorizing statute. In this case no state official was involved. This case involves a redevelopment agency whose existence and power are simply those provided by the state law. Yet the Ninth Circuit in this case found that state action immunity remained even after violation of that law, which law expressly limited agency actions to areas where private enterprise failed and which expressly preferred freely competitive private enterprise to governmental action and regulation.

The Supreme Court has previously held that a municipality is immune from antitrust liability under the state action exemption if it can demonstrate that "it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985); see *Parker v. Brown*, 317 U.S. 341 (1943). It is not necessary that the legislature explicitly state that it intends municipalities to engage in anticompetitive conduct pursuant to the state policy; it is enough that "anticompetitive effects logically would result from [the] broad authority to regulate." *Hallie, supra*, at 42. From these principles, it is clear that an antitrust violation would be established by showing that a municipality restrained trade by acting contrary to the clearly articulated state policy.

A court essentially may adopt one of the two approaches when it is attempting to determine whether anticompetitive conduct was contemplated by a state legislature. First, the court can examine the particular anticompetitive conduct against the background of all of the state's laws, and disallow any conduct that might conflict with another state policy as expressed in other statutes. In other words, the court would assume that any anticompetitive conduct that conflicts with other state policies was not foreseen by the legislature. On the other hand, a court can

presume that a legislature intended to authorize all anticompetitive conduct that foreseeably could flow from the enabling statute and leave it to the legislature to expressly limit the anticompetitive conduct, if necessary, to avoid potential conflicts with other state policies. This is an extension of the approach taken in *Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987). This is the approach used by the Supreme Court in *Hallie, supra*. The Court refused to impose a requirement that a state explicitly authorize anticompetitive conduct in order to immunize a municipality's subsequent actions, explaining that "no legislature can be expected to catalog all of the anticipated effects of a statute of this kind." It noted further that:

"Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny."

Hallie, supra, 105 S.Ct. 1719, n.7.

Under such extension of *Hallie*, in the absence of a limitation of powers in the enabling statute, a court may presume that the legislature intended to authorize all of the foreseeable anticompetitive conduct of its authorization, including that conduct that potentially conflicts with other state policies.

In the instant action *displacement of competition was not authorized*, the legislature having expressly limited and prohibited the anticompetitive activities of the Agency such as *condemnation and monopoly* when private enterprise without public assistance had accomplished or could accomplish the goals. (Health and Safety Code, §§ 33032, 33037(b), 33352 at A-188, 189, 192) Thus, under the most conservative view it is clear that an antitrust violation is established here.

This distinction alone establishes the essential difference between the case at bar and the 3 redevelopment cases cited by the Ninth Circuit. (A-9) *Cine 42nd Street Theatre Corp. v. Nederlander Organization, Inc.*, 790 F.2d 1032 (2d Cir. 1986); *Scott v.*

City of Sioux City, 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985); *Reasor v. City of Norfolk*, 606 F.Supp. 788 (E.D. Va. 1984).

In *Cine 42nd, supra*, the action was against the State and City Urban Development Organizations. The court on page 1036 found that private enterprise acting alone could *not* accomplish the legislative purpose of the State Agency. The *only* limitation on the state agency was that it must find the area to be *blighted*. The court found the area was blighted. There was no New York requirement corresponding to the here unmet California requirement of a finding that private enterprise could not by itself accomplish the result.

Another essential difference was that the redevelopment organization gave an *exclusive* developer agreement to Nederlander, also bid for by the plaintiffs. Thus, there was no destruction of existing competition. No other developer had built in the redevelopment area nor was there any one willing to pioneer the area without government assistance. There were no charges of illegal activity. There was no conspiracy to drive out of business existing developers so that the latecomer could illegally get everything.

In *Reasor, supra*, a summary judgment disposition after discovery, the city gave an *exclusive* development contract to the defendant developer prohibiting for a time any other development in the area. The city had *lawfully* invested monies to remove blight by acquiring properties under condemnation proceedings. The legislature had made no provision as in California to encourage private enterprise. Plaintiff could not prove by discovery or declaration *any illegal conduct* 606 F.Supp. at 797.

The last case in the trilogy, *Scott v. City of Sioux City*, 736 F.2d 1207 (8th Cir. 1984), also a summary judgment case, also presents a factual situation opposite to the case at bar. Iowa like New York and Virginia has no similar statutes as California Health and Safety Code, Sections 33037, 33032, and 33352, mandating that only when private enterprise acting alone fails in redevelopment do municipalities have power to act.

Sioux City condemned and acquired properties with legal Redevelopment Bond issues and gave an *exclusive* development

agreement to defendant developer. No other developer had built in the area. In order to protect its investment in the downtown area it changed the land use zoning on the periphery of the city to prevent competing commercial development. *Even after complete discovery there was no evidence of illegality or conspiracy.* While the city did not amend the master plan before changing the zoning ordinance on the outskirts, the court found these were "ordinary errors" which could be corrected at any time (736 F.2d at 1216.).

Here there were *two* legislatively required conditions for agency actions: actual urban blight which cannot reasonably be expected to be reversed or alleviated by private enterprise acting alone (Health and Safety Code § 33037) *and* a finding that improvements cannot be accomplished by private enterprise acting alone. As pointed out in *Emmington v. Solano County Redevelopment Agency* 195 Cal.App.3d 491, 497, 237 Cal.Rptr. 636 (June 1987) "the blighted condition of the area is the very basis of the redevelopment agency's jurisdiction to acquire the property by eminent domain and expend public funds for its redevelopment." *Regus v. City of Baldwin Park*, 70 Cal.App.3d 968, 980, 139 Cal.Rptr. 196 (1977) sets forth the California definition of blight:

"... blight in the context of this case can only be found in the *inability of private enterprise to redevelop the area.*" (Emphasis added.)

Plaintiffs here established, both by allegations in the complaint and by other material properly before the District Court and Ninth Circuit that *by 1981*, well before the conspiracy and well before the amended Redevelopment Plan pursuant to which the Agency carried out its anticompetitive acts, private enterprise acting alone had eliminated blight. (A-42, A-72-86)

Thus blight, the very basis of the Agency's jurisdiction, had been eliminated prior to the amended plan's adoption or anticompetitive acts. Private enterprise acting alone had not only shown that it might reasonably be expected to alleviate blight, it had alleviated it. No finding of blight or the inability of private enterprise to carry out improvements was or could be made.

Thus essential elements in the grant of state power to respondent Agency were demonstrably absent. In fact the Agency acted *contrary* to the clear state policy in favor of private enterprise acting alone. Accordingly it should have been held to have lost state authority and hence state action immunity. The Ninth Circuit instead held immune from antitrust attack Agency action which was without state granted jurisdiction, in contravention of express limits in the state policy, and in opposition to the clearly articulated and affirmatively expressed policy prohibiting displacement of competition favoring private enterprise acting alone.

In the instant action the displacement of competition by *condemnation and monopoly* is not authorized by the state, and is expressly prohibited, therefore the Agency is not immune from the Sherman Act. The state procedure to challenge the conduct (Health and Safety Code Section 33500, A-199) cannot remedy the antitrust wrong because the conspiracy included a deception to prevent petitioners from judicially challenging the adoption of the amended plans within the 60 day statutory limitation for such challenge (A-51- 55). *Emmington v. Solano County Redevelopment Agency*, 195 Cal.App.3rd 491, 497-499; 237 Cal.Rptr. 636 (June 1987); *Regus v. City of Baldwin Park*, 70 Cal.App.3rd 968, 979-981 (1977). Thus it is too late, *condemnation, monopolistic activity* and the destruction of 5 developers in the project has already occurred. Koll has already profited by acquiring 2 of the properties with the likelihood that the remaining properties including petitioners will fall in the hands of Koll.

II

THE NINTH CIRCUIT DECISION WILL PERMIT REDEVELOPMENT AGENCIES TO OPERATE WITH COMPLETELY UNFETTERED POWER TO EITHER DESTROY PRIVATE ENTERPRISE OR TO CREATE AND SUPPORT MONOPOLISTIC PRIVATE ENTERPRISE

California, as have other states, has recognized that the problem of urban blight may not have simple solutions. Accordingly, it, like other states, has granted broad powers to redevelopment

agencies so that a variety of governmentally supported approaches may be used to attempt to rectify urban blight. Without being subject to the usual legal and practical limits to the exercise of governmental power, redevelopment agencies participate in numerous and roles usually reserved for the private sector. In fact they may, at their own discretion, either completely replace the private sector or team up with certain elements of it, good or bad, to accomplish perceived goals of the agency.

Recognizing the substantial potential for abuse inherent in such power, California, as have other states, has placed some limits on the power of those other bureaucratic agencies. In this case the crucial limits were the finding and the reality that the bureaucratic governmental exercise of power was necessary, that private enterprise *could not* and *had not* alleviated blight. The Ninth Circuit held that the violations of those limits was immaterial, that once there had been a state grant of power to these local governmental agencies they had the unfettered right to create monopolies and to destroy competition.

By so holding, the Ninth Circuit undermined rather than furthered state interests. Instead of recognizing the right of states to grant power subject to limitations, it held that abuse of the limitations was in furtherance of state interests and thus immune from antitrust attack. While California's limitations related to the support of private enterprise and constituted a prohibition against governmental action unless the failure of private enterprise was established, the Ninth Circuit reasoning is not so limited and applies to any legislatively contained limitations on redevelopment agency power. Pursuant to that reasoning, redevelopment agencies may monopolize business and hand out private concessions without regard to limiting language in authorizing statutes.

By the subterfuge of characterizing the prohibited anticompetitive acts as "ordinary errors" the Ninth Circuit turns an antitrust injury into merely a immunized procedural deficiency, and thus allows the monopolistic predator to profit from the wrongs which cannot be remedied in any other action other than this antitrust suit.

There is no public purpose served in so enhancing the power of local bureaucracies which may be power hungry or corrupt. Whether or not there is real wisdom in permitting these agencies to undertake economic projects normally in the hands of private enterprise, there is real danger in removing legislatively imposed conditions and restrictions from them. By so enhancing their power to violate antitrust laws the Ninth Circuit opinion has unduly enhanced the role of redevelopment agencies in our country, a role which California, at least, specifically subordinated to private enterprise. This Court should act to restore to the states their power to limit the activities of redevelopment agencies.

III

THE NINTH CIRCUIT UNDULY EXTENDED THE NO-ERR-PENNINGTON RULE TO GRANT IMMUNITY FOR A BUSINESS CONSPIRACY TO MONOPOLIZE BECAUSE ONE PARTICIPANT WAS A MUNICIPAL AGENCY AND IS IN CONFLICT WITH OTHER CIRCUITS

In *Eastern Rail Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed. 2d 464 (1961) a publicity campaign designed to influence state laws relating to trucks was held immune from antitrust attack. Justice Black's opinion, at 365 U.S. 136, found that an association to persuade an executive or legislation bore little if any resemblance to combinations, such as an agreement to take away the trade freedom of others, normally held violative of the Sherman Act.

A few years later, in *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965) joint activities between certain coal companies and the United Mine Workers (UMW) were held immune from antitrust attack even though the activities may have been pursuant to an unlawful conspiracy between the coal companies and the UMW to eliminate the competition of certain other coal companies.

Both cases stressed the goal, essential to a democracy, of free and open communication with governmental officials. Neither case involved a governmental official, participating in a quasi-

business entity, entering into a secret conspiracy to violate State law and destroy competition. Neither case involved a program of secret agreements, duplicity, and falsehoods barring access to judicial tribunals and designed to eliminate normal open governmental communication.

Until the instant decision the Ninth Circuit maintained a distinction, in applying this governmental communication immunity, between cases like this in which the governmental official was an active conspirator and participant in the monopolistic scheme and those like *Noerr* and *Pennington* in which any conspiracy excluded the governmental officials who were to be influenced. Thus in *Harman v. Valley National Bank of Arizona*, 339 F.2d 564, 566 (9th Cir. 1964) that court held that the state official was a "participating conspirator" and therefore merited no protection. In *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969) Justice Browning held at p. 344.

However, *Harman* also holds that the Sherman Act may reach the acts of a government official if he is himself a participating conspirator in a scheme which violates that Act (citation omitted). *Pennington* does not hold to the contrary. As the Supreme Court noted, the public official involved in *Pennington* was 'not claimed to be a co-conspirator.' "

Affiliated Capital Corp. v. City of Houston, 735 F.2d 1555, 1567 (5th Cir. 1984) and *Mason City Assoc. v. City of Mason City*, 468 F.Supp. 737 (N.D. Iowa 1979) are to the same effect. In the decision below the Ninth Circuit abandoned its previous alignment with the Fifth Circuit and joined with the Seventh Circuit opinion, *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975) in holding that even active participation in a monopolistic conspiracy by a governmental official immunizes that conspiracy from antitrust attack.

In this case the Ninth Circuit also parted from the Eighth Circuit holdings in *Central Telecommunications, Inc. v. TCI Cablevision Inc.*, 800 F.2d 711 (8th Cir. 1986) and *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288 (8th Cir. 1978) that hold that *Noerr-Pennington* governmental communication

immunity is limited to genuine lobbying activities and does not extend to actions taken in connection with government officials to directly injure a competitor *by that official's violation of State law prohibiting displacement of competition.*

In this case Koll conspired with certain Agency officials to have the Agency condemn land, (A-32), eliminate parking, (A-32), make false representations in order to bar normal judicial review (A-51-56) and otherwise to act with Koll to destroy competition and create a monopoly. All of the challenged communications were secret conspiratorial conferences designed to take away the trade freedom of petitioners and others, the very activity distinguished by Black, J. in *Noerr*.

While the Ninth Circuit criticized at p. A-17-18 of its opinion, the lack of specificity in petitioners allegation, such criticism is hardly support for a *dismissal without leave to amend* in the face of a *complete discovery bar*.⁴

The Ninth Circuit has rendered legal essentially *all* activity involving governmental officials which is designed to destroy competition. This Court's decisions in *Noerr* and *Pennington* were never intended to permit such a result. With ever increasing local government intrusion into private enterprise such immunity will not serve the nation and will instead encourage corruption, cronyism and uneconomic practices.

In the instant action the conspiracy included blocking petitioners from access to state judicial tribunals by deceiving them, until after the 60-day period had expired to challenge the plan, with promises that they would be given the essential parking in the peripheral garage (Health and Safety Code Sec. 33500, A-199, A-51-56). *Emmington v. Solano County Redevelopment Agency*, *supra*, 497-499. The Ninth Circuit erroneously concluded that corrective processes were available and that petitioners could have

⁴ In fact the record contains the specific amounts of illegal campaign contributions and profits made by City officials from illegal City bond issues used to finance Koll. (A-163-185) The Ninth Circuit knew facts which would have perfected petitioners' claims. *Id.* at *Conely v. Gibson*, *supra*.

resorted to them (A-10). Because of the conspiratorial-deception it was and is too late, the damage was done and Koll has illegally profited. Certainly this conduct should not be protected by *Noerr-Pennington* immunity.

CONCLUSION

For all the reasons stated herein, the Ninth Circuit decision is completely erroneous and your Petitioners respectfully pray that this Petition for a Writ of Certiorari be granted.

Dated: May 31, 1988.

Respectfully submitted,

HERBERT F. KAISER
Attorney for Petitioners



87-2086

No.

Supreme Court, U.S.

FILED

MAY 31 1988

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

DAVID A. BOONE, et al.,
Petitioners,

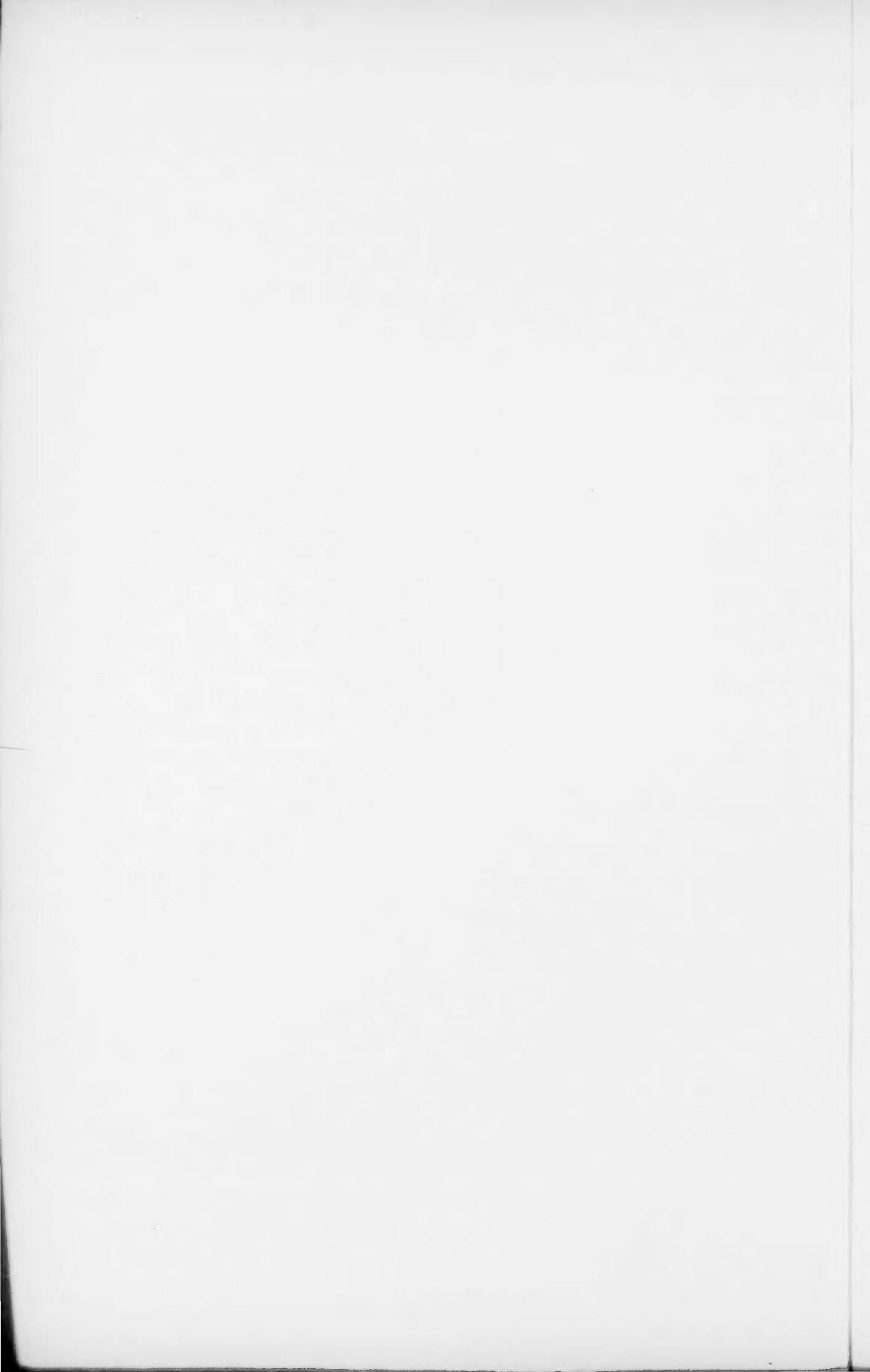
VS.

REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE, et al.,
Respondents.

APPENDIX

HERBERT F. KAISER*
The Alcoa Building, Suite 1600
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 392-1184
Attorney for Petitioners
David A. Boone, et al.

* Counsel of Record



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APPENDIX A
FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID A. BOONE; STEPHEN P. FOX,
Individually and as General
Partners of DSC-3 Group, a
California Limited Partnership
and as General Partners of
Market/Post, Ltd., a California
Limited Partnership; DAVE
GOGGIO; DONALD GOGGIO,
individually and as General
Partners of THREE G's, a
California Limited Partnership,
Plaintiffs-Appellants,

v.

REDEVELOPMENT AGENCY OF THE
CITY OF SAN JOSE, a Public Body
Corporate and Politic of the State
of California; CITY OF SAN JOSE, a
Municipal Corporation and
Subdivision of the State of
California; THE KOLL COMPANY, a
California corporation,
Defendants-Appellees.

No. 87-15046
D.C. No.
CV-84-20772-WAI
OPINION

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, District Judge, Presiding

Submitted January 4, 1988—San Francisco, California

Filed March 1, 1988

Before: J. Clifford Wallace and Cecil F. Poole,* Circuit Judges, and Robert J. Kelleher,** District Judge.

Opinion by Judge Wallace

SUMMARY

Antitrust/State Government

Appeal from dismissal for failure to state a claim. Affirmed. The court held that some of appellants allegations fall within the *Parker* state action antitrust exception and that the others fall within the *Noerr-Pennington* doctrine.

Appellant developers began construction of an office building. They allege that they began construction with the understanding that the city would provide them with adequate parking in a proposed downtown parking building. Because of this understanding, the developers did not construct adequate on-site parking. Appellee Koll also built an office building. The proposed garage was relocated to the periphery of the redevelopment area. Unlike the developers, Koll planned and constructed adequate on-site parking. The developers allege that after they finished construction of their building, the city reneged on its promise to provide them with parking in the proposed municipal garage. The district court dismissed the developers' complaints with leave to amend. The first two claims for antitrust and civil rights violations in their second amended complaint were dismissed with prejudice for failure to state a claim.

*Judge Poole was drawn to replace Judge Kennedy. He has read the briefs, reviewed the record, and listened to the tape of oral argument held on 5/13/87, in case No. 86-2506.

**Honorable Robert J. Kelleher, United States District Judge, Central District of California, sitting by designation.

[1] A city's anticompetitive acts that would normally rise to liability under the Sherman Act are shielded if the municipality acted pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation. This test requires a two-part inquiry. [2] Appellees correctly argue that they are immunized because all of their actions were carried out under the state authority of the redevelopment act. [3] The nature of activities enumerated in the Act expresses an intent by the legislature to authorize the city to do a number of things that are anticompetitive. [4] Decisions made by municipalities acting under the redevelopment act are reviewable in state courts. Concerns over federalism and state sovereignty dictate that the developers not be allowed to use federal antitrust law to remedy their claim that the city and the agency exceeded their authority under state law. [5] Ordinances survive a substantive due process challenge if they were designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and purpose of the ordinances. [6] The developers have not alleged that the appellees' interest in urban redevelopment is illegitimate. Appellees' regulation of parking is facially rationally related to the ends of urban renewal. [7] Nor have the developers stated a claim under the procedural due process clause. Under state law, there is no basis for finding that the developers acquired a property right in the original parking structure. [8] Even if estoppel could create a property interest under state law, the developers' pleading is insufficient to state a claim for estoppel. [9] Developers allege that Koll conspired with city officials to amend the redevelopment plan, thereby limiting the amount of parking available to the developers, in order to drive down the value of their building. Efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. [10] The developers four allegations in their complaint state nothing illegal and some lack specificity. [11] The developers' contend that one of three possible exceptions should apply. The first, known as the

sham exception, has not been sufficiently alleged. [12] The second states that illegal or fraudulent lobbying activities that would normally be immunized lose their protection if they occur in a judicial or quasi-judicial setting. [13] Nowhere in their complaint do the developers specifically allege that the agency and the council were acting as adjudicatory bodies when they carried out the complained of activities. [14] The third, the so-called co-conspirator exception, has been repudiated.

COUNSEL

Herbert F. Kaiser, San Francisco, California, for the plaintiffs-appellants.

Michael N. Khourie and James G. Gilliland, Jr., Khourie & Crew, P.C., San Francisco, California, for the defendants-appellees-San Jose

David T. Alexander, Jackson, Tufts, Cole & Black, San Jose, California, for the defendant-appellee-Koll

OPINION

WALLACE, Circuit Judge:

Boone and others (developers) appeal from an order dismissing their antitrust and civil rights action against the Redevelopment Agency of the City of San Jose (agency), the City of San Jose, and the Koll Company (Koll). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

This case involves a decision by the agency and the City Council of San Jose (council) not to construct a multi-story

parking garage at a certain location in downtown San Jose. The agency is a municipal corporation created under California's Community Redevelopment Law, Cal. Health & Safety Code §§ 33000-33738 (redevelopment act), for the purpose of facilitating urban renewal in the downtown San Jose area. On November 17, 1978, the council, on recommendation of the agency, enacted a comprehensive plan for combatting urban blight in the city's downtown area. Under the plan, the city was to finance construction of a multi-story parking garage.

The developers are in the real estate business and, pursuant to the city's redevelopment plan, began construction of an office building in downtown San Jose in mid-1983. They allege that they began construction of this building with the understanding that the city would provide them with adequate parking in the proposed downtown parking building. Because of this understanding, the developers did not construct adequate on-site parking.

Koll is also a real estate developer. On March 29, 1984, the council approved an amendment to the redevelopment plan, which allowed Koll to build an office building in downtown San Jose. This amendment required the relocation of the proposed municipal parking garage to the periphery of the redevelopment area. The developers allege that in return for not protesting the amendment, unnamed city officials promised to reserve a section of the relocated municipal parking structure for the developers' exclusive use. Unlike the developers, Koll planned and constructed adequate on-site parking for its building.

The developers allege that after they finished construction of their building, the city reneged on its promise to provide them with parking in the proposed municipal garage. The developers subsequently brought suit against Koll, the agency, and the city which included claims under the Sherman and Clayton Antitrust Acts, 15 U.S.C. §§ 1, 2, 16, and the equal protection and due process clauses of the fourteenth

amendment, alleging that Koll had conspired with members of the agency and the council to relocate the proposed parking structure and not to give the developers exclusive parking in that structure, in order to force the developers to sell their building to Koll at a bargain price. This "forced sale," in turn, would allegedly have given Koll a monopoly on office space in the downtown San Jose area.

The district court dismissed the developers' initial and first amended complaints with leave to amend. The first two claims for antitrust and civil rights violations in their second amended complaint were dismissed with prejudice for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). The pendent claims for promissory reliance and inverse condemnation were dismissed without prejudice so that they could be pursued in state court. The developers then timely filed this appeal from dismissal of the first two claims.

II

We review the dismissal of an action for failure to state a claim *de novo*. *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir. 1984). Reading the allegations in the complaint in a light most favorable to the nonmovant, and taking all of the allegations in the complaint as being true, see *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985) (*Western Reserve*), cert. denied, 106 S. Ct. 795 (1986), we will affirm only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 42, 45-46 (1957).

We discuss first the claims against the city and agency and then the claim against Koll.

A.

[1] The city and agency argue that they are immunized from liability by the state action exception from the antitrust laws

created in *Parker v. Brown*, 317 U.S. 341 (1943) (*Parker*). The basis of the state action exception is that the free market principles embodied by the Sherman Antitrust Act must give way to the countervailing principles rooted in federalism and state sovereignty that states must be free to act upon local concerns, even if these actions have anticompetitive results. See *id.* at 350-51. This exception was later expanded to protect municipalities in *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 51-52 (1982) (*Boulder*). The Court ruled in *Boulder* that anticompetitive acts of a municipality that would normally give rise to liability under the Sherman Act are shielded if the municipality acted pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation. *Id.*; see also *Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985) (*Hallie*). Pursuant to this test, we must undertake a two-part inquiry to determine whether state action immunity applies. We must first determine whether the California legislature authorized the challenged actions of the city and the agency. Then we must determine whether the legislature intended to displace competition with regulation. Both elements are prerequisites to proper application of the state action exception to municipal action.

A state policy is considered clearly articulated and affirmatively expressed if the statutory provision empowering the municipality's action plainly shows that "the legislature contemplated the kind of action complained of." *Hallie*, 471 U.S. at 44, quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978).

[2] Applying these principles to the instant case, the city and agency argue that they are immunized because all of their actions were carried out under the state authority of the redevelopment act. The purpose of the redevelopment act was to combat what the state legislature perceived to be a "serious and growing menace" created by blighted areas. Redevelopment Act § 33035(a). Redevelopment agencies, such as San

Jose's, were authorized by the redevelopment act to facilitate urban redevelopment. The agencies and the municipalities were granted powers by the redevelopment act as broad as the problem they faced. The redevelopment act declares that it is the policy of the state to eliminate blight "through the employment of all appropriate means," *id.* § 33037(a). To this end, the redevelopment act authorizes municipalities to enact rehabilitation plans, *id.* § 33131(a), zone and rezone and grant exceptions from building regulations and ordinances, *id.* § 33220(d), issue bonds, *id.* § 33341, and condemn property, *id.* § 33342. In addition, the redevelopment act specifically authorizes the redevelopment agency, with city council approval, to "amend or modify" redevelopment plans as necessary to carry out urban renewal, *see* Redevelopment Act § 33450, as was done here. These acts, which are clearly and affirmatively authorized by the California legislature, are precisely the types of activity that the developers challenge. Hence, the activities of the city and agency satisfy the first part of our two-prong test.

[3] Moreover, the nature of activities enumerated in these provisions expresses an intent by the legislature to authorize the city to do a number of things that are clearly anticompetitive. The power to zone and rezone, for example, by its very nature encompasses the power to exclude competition. These "state statutes need not require anti-competitive conduct for the exemption to apply when it is apparent that anti-competitive effects would result from a broad authority to regulate." *Mercy-Peninsula Ambulance Co. v. County of San Mateo*, 791 F.2d 755, 757 (9th Cir. 1986). We have ruled that similar broad grants of authority alone are sufficient to immunize "[v]irtually any anti-competitive effect," *id.* at 758, which "logically would result from [such] broad authority to regulate." *Id.*, quoting *Grason Electric Co. v. Sacramento Municipal Utility District*, 770 F.2d 833, 838 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 886 (1986). Accordingly, we conclude that the second part of our test which requires that we find a

legislative intent to displace the free market with state regulation, has been satisfied.

This specific grant of authority, coupled with the broad power to remedy blight discussed above, convinces us that the state legislature "clearly articulated and affirmatively expressed" a policy to permit anti-competitive acts, and that the state legislature contemplated the kind of municipal action about which the developers complain. *See Hallie*, 471 U.S. at 39, 44. Our conclusion is in accord with that of other courts that have considered the state action immunity exception in light of redevelopment statutes similar to California's, which authorize instrumentalities of the state to engage in activities that could have anticompetitive consequences. *See, e.g., Cine 42nd Street Theatre Corp. v. Nederlander Organization, Inc.*, 790 F.2d 1032, 1048 (2d Cir. 1986); *Scott v. City of Sioux City*, 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985); *Reasor v. City of Norfolk*, 606 F. Supp. 788 (E.D. Va. 1984).

Nevertheless, the developers argue that the redevelopment act does not apply because downtown San Jose was not a "blighted area" at the time the city acted. By its own terms, the redevelopment act was intended to promote redevelopment of "blighted areas." Redevelopment Act § 33037(a). Such areas are defined as those that constitute a "serious physical, social, or economic burden on the community" that they "cannot reasonably be expected to be reversed or alleviated by private enterprise acting alone." Redevelopment Act §§ 33030, 33032. According to the developers, the necessary prerequisites to finding blight were absent at the time the city used the redevelopment act to amend the plan. From this, they conclude that the city and agency cannot rely on the statute to immunize their actions.

Because this is an appeal from a dismissal for failure to state a claim, we must assume as true all factual allegations of material fact in the developers' complaint. *See Western*

Reserve, 765 F.2d at 1430. Thus, we must assume, as the developers allege, that the council erroneously determined that, at the time of the amendment, its downtown area was eligible for action under the redevelopment act. Nevertheless, it does not follow that the city and agency would be stripped of antitrust immunity merely because they imperfectly exercise their power under state law. A similar claim was made in *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985) (*Llewellyn*), where we ruled that Oregon's Worker's Compensation Department was immune from antitrust liability, despite allegations made by a group of chiropractors that the Board had erroneously set reimbursement rates for chiropractic services artificially low. Although *Llewellyn* involved the action of a state agency, and not a municipality, the same concerns that were raised in *Llewellyn* about the role of this court in reviewing decisions by state actors apply to this case:

“‘Ordinary’ errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control.” . . . A contrary rule would tempt aggrieved parties to forego available state corrective processes in hopes of obtaining the treble damages remedy conferred by the Sherman Act. Here state corrective processes were available, and the aggrieved parties could resort to them.

Id. at 774 (citations omitted).

[4] Decisions made by municipalities acting under the redevelopment act are reviewable in state courts. *See, e.g., Berggren v. Moore*, 61 Cal. 2d 347 (1964); *Kehoe v. City of Berkeley*, 67 Cal. App. 3d 666 (1977); *Babcock v. Community Redevelopment Agency of the City of Los Angeles*, 148 Cal. App. 2d 38 (1957). The developers have filed suit in state court, seeking review of the city's and agency's action. In this situation, the concerns over federalism and state sovereignty raised in *Hallie* and *Llewellyn* dictate that the developers not be allowed to use federal antitrust law to remedy their claim

that the city and the agency exceeded their authority under state law. They do not forfeit their immunity merely because their execution of the powers granted to them under the redevelopment act may have been imperfect in operation. See *Llewellyn*, 765 F.2d at 774.

The developers next argue that their allegations that city officials acted in bad faith and as participants in a larger conspiracy, if proven, would strip the city of its antitrust immunity. This claim is also controlled by *Llewellyn*. There, we affirmed a summary judgment against the plaintiffs on their antitrust claims, "despite the possibility of improper motivation on the part of [agency officials]," on the grounds that:

The availability of *Parker* immunity . . . does not depend on the subjective motivations of the individual actors, but rather on the satisfaction of the objective standards set forth in *Parker* and authorities which interpret it. This must be so if the state action exemption is to remain faithful to its foundations in federalism and state sovereignty. A contrary conclusion would compel the federal courts to intrude upon internal state affairs whenever a plaintiff could present colorable allegations of bad faith on the part of defendants.

765 F.2d at 774.

For the reasons discussed previously, the city and agency were acting pursuant to a clearly articulated and affirmatively expressed state policy to replace competition, and therefore the objective standards set forth in *Parker* and *Llewellyn* are met. The district court properly dismissed the developers' antitrust claims against the city and agency.

B.

The developers' next claim, brought pursuant to 42 U.S.C. § 1983, alleges that the city and agency denied them their

fourteenth amendment equal protection, substantive due process, and procedural due process guarantees. We first discuss their equal protection and substantive due process claims.

The developers base their equal protection and substantive due process challenge on the claim that the city and agency induced them into constructing an office building through promises of providing adequate parking facilities, and then denied them access to such facilities, which were financed in part through tax assessments on the developers' property. Such actions by the city and agency are alleged to have discriminatorily deprived them of economically viable use of their investment and to have unlawfully diverted funds from property tax assessments to Koll's exclusive use.

[5] The standard governing attacks on economic regulations brought under the equal protection clause is well established. "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions . . . our decisions presume the constitutionality of the [ordinances] . . . and require only that the [ordinance] challenged be rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Similarly, "ordinances survive a substantive due process challenge if they were designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and purpose of the ordinances." *Scott v. City of Sioux City*, 736 F.2d 1207, 1216 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003 (1985); *see Construction Industry Association of Sonoma County v. City of Petaluma*, 522 F.2d 897, 906 & n.11 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

[6] Here, the developers have not alleged that the interest of the city and agency in urban redevelopment is illegitimate. Such a claim would be patently frivolous. Moreover, the municipality's regulation of parking is facially "rationally

related" to the ends of urban renewal. Thus, we find no violation of the developers' equal protection or substantive due process rights.

[7] Nor have the developers stated a claim under the procedural due process clause. To do so, the developers must allege facts from which we can conclude that they had a vested property right to parking in the proposed garage. Whether a property right exists is determined by state law. The developers allege that they acquired a property right in the original parking structure, either by the city and agency issuing a building permit, or by common-law estoppel. Under state law, however, we find no basis for such a claim of entitlement under either theory.

The developers' reliance on the building permit issued to them by the city is misplaced. In their complaint, they did not allege that the city promised to provide parking in the building permit itself. The complaint states only that the permit was issued after discussions with the city and agency officials concerning the proposed garage. Absent allegations of a specific provision in the building permit requiring the city to provide parking, the permit alone is insufficient to create a cognizable property interest.

The claim that a property interest in the proposed parking facility was created by estoppel is similarly deficient. The developers have cited no case, nor have we found one, to support their claim that a property interest can be created by estoppel under the facts of this case.

[8] We need not reach that issue, however, because even if estoppel could create a property interest under California law, their pleading is insufficient to state a claim for estoppel. The alleged promises on which the developers argue they relied are pleaded in an entirely conclusory fashion. Moreover, the complaint fails to disclose facts which establish that these promises were made by persons with the authority, or

apparent authority, so that the developers, as experienced businessmen, would be justified in relying on them. Nowhere in any of their three complaints do they identify who made the promises, or what the person's legal authority, if any, was to make them. Nowhere in their complaint is there an allegation that the council promised them parking. Under the redevelopment act, it appears that such authority is granted only to the council. *See, e.g.*, Redevelopment Act § 33366-67 (city council approval required for redevelopment plan); *id.* § 33368 (decision of city council will be final); *id.* § 33450 (redevelopment plan can be amended only by city council, subject to referendum). In short, the developers plead no facts from which we can infer that their reliance on the alleged promises was in any way justifiable. Absent such allegations, the developers cannot properly assert a claim of estoppel.

III

[9] The developers also brought antitrust claims against Koll, alleging that it conspired with city officials to amend the redevelopment plan, thereby limiting the amount of parking available to the developers, in order to drive down the value of their building. Koll argues, and the district court ruled, however, that Koll's involvement in the alleged conspiracy consisted of legitimate lobbying activities that are immunized from liability by the *Noerr-Pennington* exception to the Sherman Act. In *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (*Pennington*), the Supreme Court ruled that

[E]fforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act.

Id. *Id.* at 670; *see also Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961) (*Noerr*). A contrary rule, according to the Court, could impede first

amendment rights to petition the government. See 365 U.S. at 137-38.

In our analysis of this issue, we will first determine whether the activities of Koll are of the type that the *Noerr-Pennington* doctrine seeks to protect and then discuss whether any exceptions to the *Noerr-Pennington* protections apply. Our review of the developers' arguments, however, is guided in part by the fundamental first amendment values that the *Noerr-Pennington* doctrine is designed to protect. In order not to chill legitimate lobbying activities, it is important that a plaintiff's complaint contain specific allegations demonstrating that the *Noerr-Pennington* protections do not apply. See *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1080-81 (9th Cir. 1976) (*Franchise Realty*), cert. denied, 430 U.S. 940 (1977). Conclusory allegations are insufficient to strip them of their *Noerr-Pennington* protection. *Id.* at 1081. Although we may be more generous in reviewing complaints in other contexts, our responsibilities under the first amendment in a case like this one require us to demand that a plaintiff's allegations be made with specificity. *Id.* at 1082.

A.

[10] The developers' complaint contains four basic allegations against Koll: (1) that Koll "developed close relationships" with city officials; (2) that Koll made "false reports and misrepresentations" to the council concerning the availability of parking downtown; (3) that Koll had "ex parte secret contact[s]" with city officials that culminated in "secret . . . agreements" to amend the redevelopment plan; and (4) that Koll "hired key city officials" and "made direct payments" to city and agency officials.

The first allegation goes to the very heart of the *Noerr-Pennington* doctrine. Successful petitioning of government often depends on the development of close relations between

government officials and those who seek government benefits. Indeed, cultivating close ties with government officials is the essence of lobbying. Such conduct certainly falls within the ambit of the *Noerr-Pennington* doctrine.

The same is true of the developers' allegation that Koll misrepresented facts concerning the availability of parking in the redevelopment district. As pointed out by the Court in *Noerr*, attempts to influence public officials may occasionally result in "deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information." 365 U.S. at 140. Such deception, as "reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." *Id.* at 145. While we do not condone misrepresentations, we trust that the council and agency, acting in the political sphere, can "accommodate false statements and reveal their falsity." *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1271 (9th Cir.) (*Clipper Express*), amended, 690 F.2d 1240 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983).

The developers' allegations of shadowy secret meetings and covert agreements do not take their claim outside of *Noerr-Pennington*. They have not alleged the nature of these secret agreements and secret meetings, nor have they identified the "key city officials" allegedly involved. Moreover, they have not alleged that these activities were either illegal or outside the "traditional protection[s] afforded this activity by the First Amendment." *Franchise Realty*, 542 F.2d at 1085. Most notably, the developers did not allege that these activities were perpetrated for reasons other than legitimate petitioning of government.

Even if they had made such specific allegations, the behavior they ostensibly describe falls squarely within the *Noerr-Pennington* doctrine. In *In re Airport Car Rental Antitrust Litigation*, 766 F.2d 1292, 1295 (9th Cir. 1985), cert. denied, 106 S. Ct. 2248 (1986), we ruled that private meetings between

government officials and individuals seeking to monopolize the airport car rental market was a form of advocacy protected by the *Noerr-Pennington* rule. The redevelopment process, by its very nature, allows for ex parte deliberations between decision makers and advocates of a particular view. See *In re Airport Car Rental Antitrust Litigation*, 521 F. Supp. 568, 588 (N.D. Cal. 1981) (evidence of a series of ex parte meetings between defendants and public officials resulting in a contract to exclude competitions "prove[s] nothing other than a classic case for application of the *Noerr-Pennington* doctrine"), *aff'd*, 693 F.2d 84 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983).

The developers' allegations of "payments to" and the "hiring of" key city officials suffer a similar fate. Again, they make these allegations in the most conclusory of fashions. We are not told who, when, how much, or for what purpose. More important, even if these allegations had been made with the requisite specificity, the alleged activities are facially valid. Former government officials are often times hired by organizations seeking to petition government. Their expertise makes them particularly well suited for such a role. Payments to public officials, in the form of honoraria or campaign contributions, is a legal and well-accepted part of our political process. As stated by the Seventh Circuit:

Clearly, allegations concerning campaign contributions do not convert into a Sherman Act violation conduct which *Noerr* held was not covered by the Act. We do not condone the giving or acceptance of campaign contributions as inducements to support the donor's interests in the legislative process. We merely hold that this conduct was not intended to be covered by the Sherman Act.

Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220, 231 (7th Cir. 1975) (*Metro Cable*); see also *Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference*, 155 F. Supp.

768, 803-04 (E.D. Pa. 1957), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd*, *Noerr*, 365 U.S. 127 (1961) (allegations that competitors made campaign contributions and worked in close liaison with public officials are insufficient to state an antitrust claim).

The developers did not allege that the hiring of, or payments to, the public officials was otherwise illegal. Thus, even if these alleged activities were carried out solely to influence the agency and the council, they fall within the *Noerr-Pennington* doctrine.

B.

That the complained about conduct is the type protected by the *Noerr-Pennington* rule does not end the dispute. Such conduct may be excepted from the protection in certain circumstances. The developers' argument that such exceptions apply will now be considered.

[11] While the developers' brief is far from clear, they appear to contend that we should apply any one of three possible exceptions to the *Noerr-Pennington* doctrine. The first exception that they argue is known as the "sham exception," and is based on a suggestion made by the Court in *Noerr* that when "a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . [then] application of the Sherman Act would be justified." 365 U.S. at 144. The developers have neither alleged the existence of a publicity campaign nor that Koll was not genuinely seeking official action from the city and agency. Such allegations are necessary to state a claim under this exception. *See Franchise Realty*, 542 F.2d at 1080-81.

[12] The developers next contend that their allegations of misrepresentations, payments to public officials, and "secret

backroom dealings" on the part of Koll fall within a second exception to *Noerr* created in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (*Trucking Unlimited*). In *Trucking Unlimited*, the Court ruled that illegal or fraudulent lobbying activities that would normally be immunized by *Noerr-Pennington* lose their protection if they occur in a judicial or quasi-judicial setting:

There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.

Id. at 513; see also *Clipper Express*, 674 F.2d at 1271. Our analysis of the developers' claim, therefore, is guided in part by the role played by the agency and the council when the plan was amended and the developers' parking was limited. If the agency and the council were acting as adjudicative bodies, the range of lobbying activities immunized by *Noerr-Pennington* would be much narrower.

[13] We faced a similar situation in *Franchise Realty*. In that case, the plaintiff sued two associations of restaurant and hotel employers which had allegedly conspired to oppose the plaintiff's efforts to secure building permits from the San Francisco Board of Permit Appeals. 542 F.2d at 1078. We ruled that the Board of Permit Appeals was "as much a political as an adjudicatory body." *Id.* at 1079. Like the Board of Permit Appeals in *Franchise Realty*, the agency and the council have broad discretion to amend the plan, and approve or disapprove of new projects, whenever they deem it is "necessary or desirable" to carry out the ends of redevelopment. Redevelopment Act § 33450. Determination of what is "necessary or desirable" is vested exclusively with the agency and the council. As in *Franchise Realty*, "[t]he absence of more definite standards suggests that the [agency] is as much

a political as an adjudicatory body." 542 F.2d at 1079. Indeed, nowhere in their complaint do the developers specifically allege that the agency and the council were acting as adjudicatory bodies when they carried out the complained of activities. Rather, they alleged that they were barred access to the city's administrative and "legislative" processes.

The developers now specifically contend that the agency and council's decision was adjudicatory. Their reliance on *Horn v. County of Ventura*, 24 Cal. 3d 605 (1979), for this proposition is misplaced. In *Horn*, the court ruled that the approval of a subdivision redevelopment by a planning department that would result in a "substantial" deprivation in the value of adjoining property was an adjudicatory act to which procedural due process protections attached. *Id.* at 612. The court based its holding primarily on the fact that "[s]ubdivision approvals, like variances and conditional use permits, involve the application of general standards to specific parcels of real property. Such governmental conduct, affecting the relatively few, is 'determined by facts peculiar to the individual case' and is 'adjudicatory' in nature." *Id.* at 614. The court distinguished this situation from one involving "general rezoning" of a large area, which is more akin to a legislative process. *Id.* at 613; see also *San Diego Building Contractors Association v. City Council*, 13 Cal. 3d 205, 208 (1974), *appeal dismissed*, 427 U.S. 901 (1976). A redevelopment plan and its amendments obviously involve a large area and affects virtually every member of the community. In addition, all amendments to the redevelopment plan must be approved by the city council, which is defined by the redevelopment act as a "legislative body." Redevelopment Act § 33007. Thus, even though proceedings before the agency have some of the trappings normally associated with adjudicatory procedures, all final decisions are made by the council, a distinctly legislative body. Although this case does not require us to draw a bright line between adjudicative and legislative processes, these considerations convince us that, like the Board of Permit Appeals involved in *Franchise Realty*,

the agency and council were carrying out essentially legislative tasks in amending the plan.

The legislative nature of the city's decision distinguishes this case from *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830 (9th Cir. 1980) (*Hahn*). There, the plaintiff (*Hahn*) alleged that the defendant (*Codding*) had filed a series of frivolous lawsuits solely to interfere with *Hahn's* attempt to build a shopping center. *Id.* at 836. We applied the *Trucking Unlimited* exception on the grounds that "*Codding* has invoked the judicial process not once, but thirteen times, in what the *Hahn* complaint describes as a thus far successful effort to prevent a competitor from entering the marketplace." *Hahn*, 615 F.2d at 842. *Hahn* clearly involves the misuse of judicial and not legislative processes. We conclude that the *Trucking Unlimited* exception to the *Noerr* protection does not apply to the actions of the city and the agency.

[14] The developers' final argument is that because they have alleged that city officials were active participants in the alleged conspiracy, we should apply the so-called "co-conspirator" exception to *Noerr-Pennington*. In *Harman v. Valley National Bank of Arizona*, 339 F.2d 564, 566 (9th Cir. 1964), a case decided before *Pennington*, we suggested in dicta that *Noerr* might not apply if a public official were a participating conspirator in the alleged agreement to restrain trade. *See id.* This view, however, was repudiated by *Pennington*. As we stated in *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341, 342-43 (9th Cir. 1969):

The Supreme Court decisions have eroded the authority of . . . *Harman* . . .

....

Pennington held that efforts to influence public officials are not illegal even if part of a broader anti-competitive scheme. *Harman* was based on this

view that an attempt to influence an official when part of a larger scheme is subject to the federal anti-trust laws.

Thus, *Noerr-Pennington* cannot be circumvented by merely alleging that a government official was involved in the alleged conspiracy. *See also Metro Cable*, 516 F.2d at 230 (rejecting co-conspirator exception because it would "abrogate" the *Noerr* doctrine).

IV

The developers have been given two opportunities to amend their complaint to state a cause of action against the city and Koll. The allegations made against the city in their second amended complaint fall squarely within the *Parker* state action antitrust exception. Their allegations against Koll consist of activities clearly protected by the *Noerr-Pennington* doctrine. Their civil rights claims are facially deficient. Therefore, the district court's dismissal of the developers' action is affirmed.

AFFIRMED.

Appendix B

United States District Court
Northern District of California

NO. C-84-20772-WAI

David A. Boone and Stephen P. Fox, individually and as
general partners of DSC-3 Group, a California Limited
Partnership, as general partners of Market/Post, Ltd., a
California Limited Partnership; Dave Goglio and Donald
Goglio, individually and as general partners of Three G's, a
California Limited Partnership,
Plaintiffs,

- vs.

Redevelopment Agency of the City of San Jose, a Public Body
Corporate and Politic of the State of California; City of San
Jose, a Municipal Corporation and Subdivision of the State of
California; Frank Taylor, The Koll Company,
a California Corporation,
Defendants.

MEMORANDUM OF DECISION

[Filed Jan. 24, 1986]

Clerk's Record Docket No. 115

Plaintiffs have filed herein their Second Amended Complaint in which they set forth two causes of action against all defendants: (1) Conspiracy to violate federal antitrust laws; and (2) violation of 42 U.S.C. § 1983. Plaintiffs assert two causes of action against defendants City and Redevelopment Agency only: (1) promissory estoppel; and (2) inverse condemnation. Defendants and each of them have moved to dismiss each of the causes of action asserted by plaintiff for failure to state a claim upon which relief may be granted. (Fed. R. Civ. Pl. 12(b)(6)).

I

FEDERAL ANTITRUST CLAIM

The motion of defendants to dismiss the First Cause of Action is Granted Without Leave To Amend. Plaintiffs' claims against defendants City of San Jose and Redevelopment Agency of the City of San Jose are barred by the doctrine of "state action immunity"; the action against defendant The Koll Company is barred by the so-called *Noerr-Pennington* doctrine.

The allegations of the First Cause of Action are essentially similar to those contained in the First Amended Complaint, except that plaintiffs now allege in addition the procedural deficiencies committed by the defendant City and the defendant Redevelopment Agency leading to the approval of the project of defendant The Koll Company; that the defendant City and defendant Redevelopment Agency destroyed certain tapes of meetings, and that defendant The Koll Company made direct payments of money to personnel employed by defendant City and the defendant Redevelopment Agency and hired former employees of the defendant City, and that defendant The Koll Company undertook to bar the access of plaintiffs to judicial tribunals.

In order to sustain the existence of "state action immunity" it must appear that the municipality seeking the immunity acted pursuant to a state policy to displace competition with regulation and that particular policy must be clearly articulated and affirmatively expressed. *Lorrie's Travel and Tours, Inc. v. SFO Airporter, Inc.*, 753 F.2d 790 (9th Cir. 1985). A clearly articulated state policy is contained within the provisions of California Health and Safety Code §§ 33006-33885. In particular, Health and Safety Code § 33037(a) contains the language:

. . . to protect and promote the sound development and redevelopment of blighted areas and the general welfare of the inhabitants of the communities in which they exist by remedying such injurious conditions through the employment of all appropriate means.

Additionally, §§ 33125(c), 33131(a), 33220(d), 33341, 33342 and 33396 contain express grants to employ the means to accom-

plish redevelopment, all of which are pertinent and clearly articulated against the background of this case as alleged in the Second Amended Complaint.

Furthermore, it will be assumed that the legislature contemplated the implementation of the challenged restraint if it was a "necessary or reasonable consequence of engaging in the authorized activity." *Lorrie's Travel, supra; Springs Ambulance Service v. City of Rancho Mirage*, 745 F.2d 1270 (9th Cir. 1984); *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005 (9th Cir. 1983).

The allegations of the Second Amended Complaint concerning violations of state law in the processing of the approval of The Koll Company building do not deprive the municipal defendants of immunity. *Llewellyn v. Crothers*, 1985-2 Trade Cases (CCH) ¶ 66,685 (9th Cir., July 8, 1985). In that case, the adoption of a *de facto* fee schedule for licensed chiropractors was immune from antitrust prosecution under the doctrine of "state action immunity" even though the schedule was adopted in a procedurally improper manner. The court said:

A state's antitrust immunity springs from an essential principal of federalism, the necessity to respect a sovereign capacity in the several states. (Citation omitted). Given this purpose, it follows that actions otherwise immune should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law.

Nor does the assertion in the Second Amended Complaint (¶ 27) that defendant The Koll Company hired key city officials and made direct payments and other valuable considerations and inducements to city and agency personnel render the state action immunity inapplicable to this case. There is no assertion on the fact of the Second Amended Complaint, nor was any made in the course of oral argument as to the nature of the payments in question. If plaintiffs intend to allege and impropriety in the nature of bribery or some like activity, such grave allegations are in this court's opinion subject to the provisions of Fed. R. Civ. P. 9(b), requiring that both the nature of the acts and the individu-

als involved be alleged with specificity. In the course of oral argument and in support of their motion for the imposition of Rule 11 sanctions, defendants suggest that discovery in this case reveals that the asserted payment were in the form of campaign contributions. If that is so, then the immunity is undisturbed. *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975). The court is mindful that in a Rule 12(b)(6) motion, the court may not go beyond the four corners of the complaint in evaluating whether a claim has been stated upon which relief may be granted. In this instance, the decision is entirely based upon the nature of the conclusory and imprecise allegations of ¶ 27 rather than upon the suggestions as to the nature of the payments which were made at oral argument.

The case of *Westborough Mall v. City of Cape Girardeau, Mo.*, 693 F.2d 733 (8th Cir. 1982), is not helpful to plaintiff on the issue of state action immunity because it deals with zoning and not with a clearly articulated policy expressed by a state legislature such as the policy in issue here. The legislature in the instant case specifically enumerated, in the sections of the Health and Safety Code which have been previously referred to, actions contemplated and proper for the purpose of furthering the purpose of the statutory scheme. Furthermore, the idea suggested in *Westborough Mall*, that state action immunity may not avail if public officials act out bad motives was laid to rest by the Ninth Circuit court in *Llewellyn, supra*, where it was held that the availability of state action immunity depends not on such subjective motivations, but rather on the satisfaction of objective standards.

In sum, plaintiffs' allegations as pleaded do not state a claim of antitrust violations against defendant City or against defendant Redevelopment Agency.

Plaintiffs argue with emphasis that the facts as alleged in the Second Amended Complaint are markedly distinguishable from the facts of the authorities to which I have already referred. It is their claim that the allegation of conspiracy purported to exist between the city council of the city of San Jose, the Redevelopment Agency of the city of San Jose and The Koll Company remove this case from the purview of the authorities because none

of those involve a situation where a governmental entity, purporting to act within the limits of clearly articulated state policy, has undertaken to conspire with another for an unlawful and predatory purpose. As a threshold matter, under plaintiff's theory, it is apparent that the alleged co-conspirators must be the named defendants, i.e., the defendant City of San Jose, the defendant Redevelopment Agency and the defendant The Koll Company. Under this theory, at a minimum, plaintiffs should have, and have not, specifically alleged the authority of those who purported to do the acts which plaintiffs say render the defendant City and the defendant Agency co-conspirators.

Plaintiffs argue that they have been curtailed in discovery and by inference are thereby unable to allege facts more specifically than they have done in their Second Amended Complaint. My review of the file in this matter reveals a stipulated order staying discovery until after May 20, 1985. An earlier order made by United States Magistrate Wayne D. Brazil, and filed on April 11, 1985, stayed discovery until after I ruled on defendant's motions for judgment on the pleadings with respect to plaintiff's Amended Complaint. By stipulation, those motions were withdrawn. (See Stipulated Order Re Discovery in briefing schedule filed April 25, 1985.)

In support of the distinction which they seek to draw, the plaintiffs cite the following language in *Parker v. Brown*, 317 U.S. 341, 351 (1942):

True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, (citation omitted) and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade, (citation omitted).

And to language contained in *Scott v. City of Sioux City, Iowa*, 736 F.2d 1207, 1214, 1215 (8th Cir. 1984):

A city council could conceivably violate the antitrust laws by entering into an agreement with a private developer to restrain trade.

The *Scott* court cited *Westborough Mall, supra*, (dealing with the employment of means other than legitimate lobbying in the context of the *Noerr-Pennington* doctrine); *Mason City Center Assoc. v. City of Mason City*, 671 F.2d 1146 (8th Cir. 1982), (a case involving zoning and not a comprehensive regulatory system clearly articulated and affirmatively expressed by the state legislature); *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated on other grounds*, 435 U.S. 992. None of these cases provide definitive authority for the position which plaintiffs desire this court to take in ruling on this motion. At most, they say that under certain factual conditions, entities in the position of these defendants might incur antitrust liability which would not be sheltered under any immunity doctrine. In the instant case, observant of the doctrine of *Conley v. Gibson*, 355 U.S. 41 (1957), this court has no difficulty in concluding that as pleaded, plaintiffs could prove no set of facts in support of their claim which would entitle them to antitrust relief against defendants. Plaintiffs' opportunity to do so has been treble. Further leave to amend upon this record is unjustified and must be denied.

Furthermore, if states may replace competition with regulation, by clearly articulated state policy, which is in furtherance of a sovereign aim, it is difficult to see how conduct which, if not immunized, would be predatory, and would constitute one of the elements for relief under the Sherman Act, can become a distinguishing element in overcoming the very immunity which was designed to protect that conduct. Here, the purport of plaintiffs pleadings in their Second Amended Complaint indicate governmental action pursuant to articulated state policy and do not clearly plead unauthorized action on the part of state employees to further a conspiracy with private individuals. (See *Omni Outdoor Advertising v. Columbia Outdoor*, 506 F. Supp. 1444 (D.C.S.C. 1983); *Schiessle v. Stephens*, 525 F. Supp. 763 (N.D. Ill. 1981). At oral argument, plaintiffs sought to distinguish the applicability of state urban redevelopment procedures on the basis that at the time of the events described in the Second Amended Complaint, the area in question had either ceased to be or was not blighted. Surely at some point, in every instance of redevelopment, the authorized activities of the agencies responsible for redevelopment cure substantial portions of the blight which justi-

fied agency action in the first place. No authority is cited which would tend to support the notion that somehow the applicable statutes become inapplicable when those implementing them have nearly completed the task to which they set themselves. The case of *Regus v. City of Baldwin Park*, 70 Cal. App. 3d 968 (1977), is not apt because there the court found insufficient evidence of blight *in the first instance*. In the instant case, the City of San Jose passed for publication on June 24, 1975, Ordinance No. 17778, wherein the City Council made an adequate finding based upon sufficient evidence that the area in issue here was in fact blighted. This court may take judicial notice of such ordinances under Rule 201, Fed. R. Evid. *Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir. 1977); *Oceanic California, Inc. v. City of San Jose*, 497 F. Supp. 962, 967 n.8 (N.D. Cal. 1980). In the instant case, there are insufficient well-pleaded allegations to successfully charge that defendants acted in a fashion which was not reflective of state policy, but rather was inconsistent with the antitrust laws. *Cf. City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

Defendant The Koll Company contends that assuming the truth of the well-pleaded allegations of plaintiffs, it is immune from antitrust attack under the *Noerr-Pennington* doctrine, which is based upon that defendant's First Amendment right to petition the government. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). This defendant relies upon *Llewellyn, supra*, contending that the conspiracy allegations as contained in the Second Amended Complaint are insufficient because of their vague and conclusory terms. Defendant The Koll Company asserts that the sham exception to the *Noerr-Pennington* doctrine has no application here because allegations that a defendant utilized its petitioning activity not for the purpose of influencing government action, but rather for the purpose of barring plaintiffs from access to governmental bodies and tribunals, may not be pleaded in vague or conclusory terms lest the exercise of the right to petition be chilled by the threat of antitrust suits. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976). An examination of the Second Amended Complaint

reveals that plaintiffs do not allege that defendant Koll's petitioning activity barred their access, but rather, that the City's promises deterred their utilization of such access. At best, they allege that certain promises made by the City were a sham. They do not allege that Koll's petitioning activity was a sham. Therefore, the sham exception to the *Noerr-Pennington* doctrine has no applicability here, and on its face, the Second Amended Complaint fails to state a claim for antitrust violation against defendant The Koll Company. The case of *Westborough Mall, supra*, held that the *Noerr-Pennington* doctrine was not intended to protect those who employ illegal means to influence their representatives in government, and that actions beyond traditional political activity are not protected by that exemption. However, in the instant case, nothing is pleaded, beyond conclusory materials, to properly allege unlawful conduct on the part of The Koll Company or activity transcending legitimate lobbying.

II

42 U.S.C. § 1983

Count Two of the Second Amended Complaint alleges that defendants, through their actions, deprived plaintiffs of due process and equal protection. Defendants move to dismiss on the grounds that § 1983 claims are restricted to deprivations of rights secured by federal law and that plaintiffs have alleged no such federal rights deprivation.

Plaintiffs characterize their violated rights as "the economically viable use of their property and the fulfillment of their investment-backed expectations" and their rights as secured by California's community redevelopment law. Plaintiffs, relying upon *Scott v. City of Sioux City, Iowa*, 736 F.2d 1207 (8th Cir. 1984), assert that they have pled "a legitimate claim of entitlement" to parking based upon their mutual understanding with City defendants. They claim therefore that they have an entitlement which is constitutionally protected, rather than a mere expectation under state law which is not constitutionally protected. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972). In asserting their legitimate claim of entitlement to the

parking accommodations in question, plaintiffs rely upon the "express contract or mutual understanding with the defendants," as expressed in *Scott, supra*. However, as pointed out by defendants, the purported assurances are pleaded in conclusory fashion and nowhere in the Second Amended Complaint do any allegations of the identity of the persons making such assurances appear, not what their legal authority, if any, was to make them.

Such allegations seem to the court to be minimally necessary in order to make any determination with respect to such an express contract or mutual understanding. Absent such a showing, a loss of business or commercial expectations are not cognizable under § 1983, unless it is alleged that there exists no rational basis for the undertaking of the challenged governmental action. *Construction Industry Assoc. of Sonoma County v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975); *Contra Costa Theatre, Inc. v. City of Concord*, 511 F. Supp. 87 (N.D. Cal. 1980) *aff'd*, 686 F.2d 798 *cert. denied* 103 S. Ct. 1777 (1983).

Plaintiffs have not alleged, in their attempt to state their claim based upon denial of the equal protection of the laws, that they have been denied rights or privileges granted to others. An allegation of unequal treatment of persons similarly situated is a necessary allegation. *Mlikotin v. City of Los Angeles*, 643 F.2d 652 (9th Cir. 1981). The allegations of paragraphs 20, 29, 32, 36 and 66 of the Second Amended Complaint are to the opposite effect.

The Second Amended Complaint does not state a claim upon which relief may be granted under § 1983 for violation of plaintiffs' right to the equal protection of the laws or to substantive or procedural due process.

Therefore, the Second Cause of Action is DISMISSED WITHOUT LEAVE TO AMEND.

III

PENDENT CLAIMS

Inasmuch as the federal claims asserted in the Second Amended Complaint are DISMISSED WITHOUT LEAVE TO

AMEND, plaintiffs shall show cause within FIFTEEN (15) DAYS from the date of this order why the pendent claims asserted in Counts III and IV should not be dismissed without prejudice under this court's discretion as defined in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), to be reasserted in state court.

IV

RULE 11 SANCTIONS

All applications for Rule 11 sanctions are DENIED.

Dated: 1-24-86.

/s/ WILLIAM A. INGRAM
William A. Ingram
United States District Judge

Appendix C

Herbert F. Kaiser, Esq.
Attorney at Law
Suite 1250—Alcoa Building
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 392-2255
Attorney for Plaintiffs

United States District Court
Northern District of California

David A. Boone and Stephen P. Fox, individually and as
general partners of DSC-3 Group, a California Limited
Partnership, as general partners of Market/Post, Ltd., a
California Limited Partnership; Dave Goglio and Donald
Goglio, individually and as general partners of Three G's a
California Limited Partnership,
Plaintiffs,

vs.

Redevelopment Agency of the City of San Jose, a Public Body
Corporate and Politic of the State of California; City of San
Jose, a municipal corporation and subdivision of the State of
California; Frank Taylor, the Koll Company, a California
Corporation,
Defendants.

Second Amended Complaint for Damages and Injunctive Relief
for Conspiracy to Violate the Antitrust Laws, Federal Civil
Rights Act and Constitution of the United States; Promissory
Reliance and Inverse Condemnation [Filed July 25, 1985]

[Jury Trial Demanded]
Clerk's Record Docket No. 73

Plaintiffs David A. Boone and Stephen P. Fox, individually and
as general partners of DSC-3 Group, a California limited partner-
ship, David Goglio and Donald Goglio, individually and as gen-
eral partners of Three G's, a California limited partnership,
demanding a trial by jury, complain and allege as follows:

COUNT ONE

CONSPIRACY TO VIOLATE ANTITRUST LAWS

I

JURISDICTION AND VENUE

1. This action arises in part under §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), § 4 of the Clayton Act (15 U.S.C. § 15) and the Civil Rights Act of 1971 (42 U.S.C. § 1983). It seeks injunctive relief and damages for injuries caused by defendants' actions in violation of those acts, and also in violation of California law.

2. This court has jurisdiction pursuant to the Sherman Act (15 U.S.C. § 4) and to the Clayton Act (15 U.S.C. § 15). It also has jurisdiction pursuant to 28 U.S.C. §§ 1331(a), 1343(3), 2201 and 2202. It also has jurisdiction by reason of the operation of the doctrine of pendant jurisdiction.

3. The unlawful conspiracy and acts, predatory conduct and violations of law which are described below have been, in part, conceived, carried out, and made effective within the Northern District of California, and each defendant transacts business in this district.

II

PARTIES

4. Plaintiffs David A. Boone ("Boone") and Stephen P. Fox ("Fox") are individual citizens of the State of California, and are general partners in DSC-3 Group, a California limited partnership, and in Market/Post, Ltd., a California limited partnership. Plaintiffs Dave Goglio and Donald Goglio (hereinafter collectively called "Goglio") are individual citizens of the State of California, and are general partners in Three G's, a California limited partnership. Boone and Fox and the three abovementioned limited partnerships are engaged in the business of developing office buildings and renting office space in San Jose, California. Plaintiffs were induced by defendants Redevelopment Agency and City officials to build the largest office building in

San Jose (three times the size plaintiffs originally intended) invest \$56 million in a redevelopment project in furtherance of Redevelopment Plan and goals with the inducement and promise of protection in the form of City-provided parking facilities.

5. Defendants are:

(a) The Redevelopment Agency of the City of San Jose ("Agency") is a public agency organized and existing under a resolution of the City Council of San Jose;

(b) City of San Jose ("City") is a municipal corporation and subdivision of the State of California;

(c) Frank Taylor ("Taylor") was at all relevant times executive director of the Redevelopment Agency;

(d) The Koll Company, a California corporation ("Koll"), with its principal place of business in Newport Beach, California. Said Defendant is a private developer engaged in the business of developing office buildings and renting office space. Said defendant conspired with defendant City and Agency officials, Frank Taylor, and co-conspirators, combining their economic and political power to interfere with plaintiffs' business, eliminate plaintiffs as a competitor and totally destroyed the economically viable use of plaintiffs' investment in the Redevelopment project described herein so that defendant Koll could acquire plaintiffs' assets by said predatory conduct.

6. Defendants have acted as agents of one another, in concert with one another and as co-conspirators in the violations of the law which are hereinafter alleged.

III

AGENTS AND CO-CONSPIRATORS

7. Certain public officials, corporations, persons, partnerships, businesses, entities including equity partners of defendant Koll, professional appraisers, planning and design engineers and experts not named as defendants knowingly aided and abetted, made statements, destroyed public records and tapes and participated in, conspired with and performed acts in furtherance of the

violations of the law alleged herein. Plaintiffs are presently unaware of the identity of all the co-conspirators who participated in the violations of the law hereinafter alleged. When known, plaintiff will seek leave of the Court to amend this Complaint.

IV

THE MARKET

8. Interstate commerce is herein involved. This action concerns the construction and operation of office buildings and parking structures using materials which are in the flow of the interstate commerce. The office space is in part for use by persons who conduct interstate commerce, is financed through the means of interstate commerce, and may compete for tenants in interstate commerce.

9. Defendant Koll conspired and acted with defendants City and Redevelopment Agency officials, Frank Taylor, and the unnamed co-conspirators to engage in an unlawful combination and *conspiracy to violate the antitrust laws of the United States* by restraining competition and monopolizing interstate trade and commerce in the market for office space and parking in Central San Jose and the Pueblo Uno Redevelopment Project area. The purpose and intent of this unlawful conspiracy was to prevent and eliminate plaintiffs as competitors of Koll in that and other markets, and totally destroy the economically viable use of plaintiffs' property in order to predatorily acquire plaintiffs' assets at distressed or bankrupt values.

V

SUMMARY OF CHALLENGED ACTIVITY

10. Defendant Koll conspired with the City and Agency defendants, including Frank Taylor, to get their vigorous involvement in orchestrating and carrying out aspects of the conspiracy among other things Taylor, City and Agency defendants induced plaintiffs to build the largest office building in San Jose (three times larger than they originally intended), and invest \$56 million in the redevelopment project by falsely promising plaintiffs the

protection of the Pueblo Uno Redevelopment Plan and parking ordinances wherein the City and Agency were obligated to provide for the increased parking needs of office building developers such as plaintiffs in its Pueblo Uno Project Area. Defendants knew that plaintiffs would seek construction financing and later interim and permanent financing based on the City's plan and promise to provide parking. Such parking is necessary to rent office space to provide income to service debt and operating expenses. The final predatory act planned by Koll and the other defendants was to combine to block plaintiffs from acquiring adequate parking without any rational relational relationship to any permissible interest of the city or agency after plaintiffs had built the building without providing adequate parking themselves, because of the City and Agency promises. Defendants knew that plaintiffs would not be able to compete with Koll in the market for renting office space without the promised parking, and plaintiffs would not be able to get take-out interim or permanent financing because of the blocked parking. Thus plaintiffs and other competitors would either have to sell to Koll (who controlled all the parking in the project area) at a distressed price or Koll could acquire plaintiffs' property in foreclosure by the construction lender after plaintiffs' other financing was denied.

11. Pursuant to the conspiracy and offenses charged herein, and in furtherance of their intention to accomplish their purposes as alleged herein, defendants and their named co-conspirators did numerous predatory acts that will be described later in more detail. Such predatory acts included, but were not limited to:

(a.) Defendant Koll developed close relationships with City and Agency officials, made ex parte secret contact with those officials to accomplish their said unlawful purpose to eliminate plaintiffs as a competitor;

(b.) Defendant Koll conspired with defendant City and Agency officials to receive preferential treatment to accomplish the said purpose of the conspiracy;

(c.) Such persons combined their economic and political power to stop plaintiffs from getting the promised adequate

parking by secret contact and agreements with City and Agency officials;

(d.) Koll under pretext of soliciting plaintiffs' construction business, monitored plaintiffs' development and financing activities in order to apply the ultimate knock-out punch of blocking plaintiffs' parking at a time when it was too late for plaintiffs to change their plans for building adequate parking and thereby obtain interim or permanent financing;

(e.) Koll timed the solicitation of plaintiffs' construction business at the same time Koll had secretly negotiated with the City to block plaintiffs' and all other competitors from City parking facilities so they could not compete with Koll. Koll agents did not tell plaintiffs of these secret agreements when they solicited plaintiffs' business and were told that plaintiffs were relying on the promised City parking facilities in order to rent space and obtain financing;

(f.) Defendants and co-conspirators blocked plaintiffs' legitimate access to the administrative and legislative decision making process and such persons deceived plaintiffs by the continued promises of providing parking in City facilities;

(g.) Defendants and co-conspirators blocked plaintiffs' access to judicial review of City's legislative process by deceitfully inducing plaintiffs to rely on the City's and Agency's promises of parking. This continued until after the expiration of the time limits of the means by which plaintiff could seek ordinary judicial review of plaintiffs' opposition to, among other things, sham, arbitrary and discriminatory passage of ordinances, amended redevelopment plans and condemnation proceeding;

(h.) Defendant City and Agency officials and Taylor conspired with Koll in making false property appraisals, financial analysis, and misrepresentations to promote Koll's conspiracy to take over and monopolize the market and to drive plaintiffs out of business. In further support of the conspiracy, defendants and co-conspirators acted to transfer land to Koll at less than fair-market re-use value in violation of § 33433 Health & Safety Code Community Redevelop-

ment Law; and to mislead the legislative body to induce it to adopt and pass the Koll development agreement and institute sham condemnation proceedings;

(i.) Defendant City and Agency officials made false reports and misrepresentations to the legislative body concerning the environmental and traffic impact of the Koll plan in order to prevent all competitors, including plaintiffs, from access to public parking facilities in the Pueblo Uno property area. Included in such misrepresentations was the claim specifically misrepresentating to the legislative body that the Koll scheme and plan was authorized by the "Downtown San Jose 1995" environmental impact report. That claim was untrue and the Koll scheme was in fact in violation of the California Environmental Quality Act § 21166 Public Resources Code and California Community Redevelopment Law § 56035, 56040 Health and Safety Code;

(j.) As a result of the conspiracy and its achievements, Koll, and its co-conspirators have already excluded one competitor in the project area and Koll has taken over its building;

(k.) Koll, because of the conspiracy, was able to know ledgeably tell prospective tenants that plaintiffs would not be able to obtain parking;

(l.) Koll approached plaintiff through a straw entity owned by Koll to purchase plaintiffs' building at a distressed price because as a result of the conspiracy plaintiffs could not provide parking and the value of plaintiffs' building was greatly diminished;

(m.) Defendants and co-conspirators destroyed public records, minutes and tapes of the Planning Department and Pueblo Uno community meetings which support plaintiffs' claims herein, both before and after this cause came within the jurisdiction of this Court.

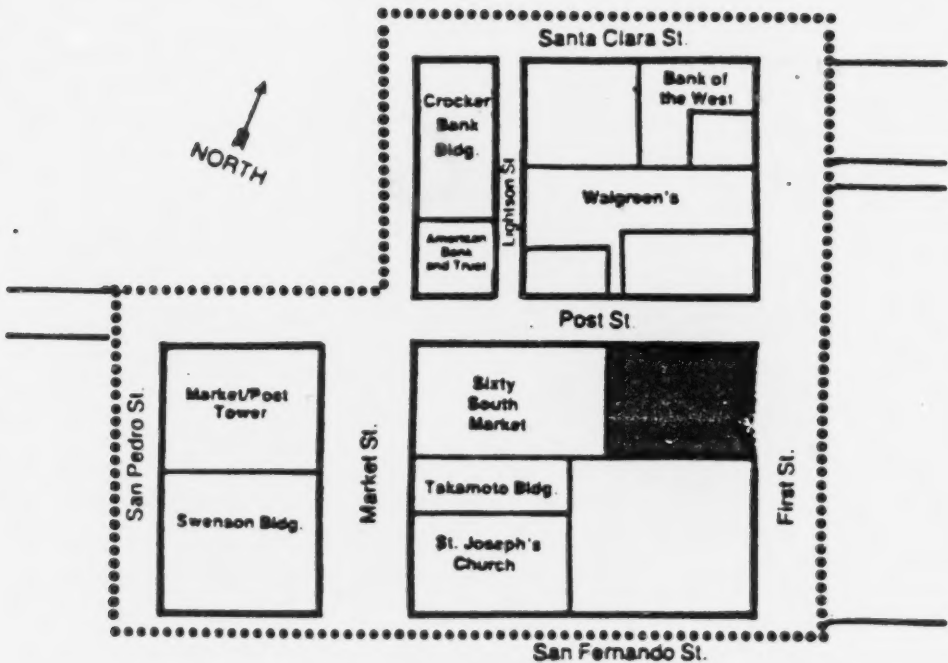
VI

BACKGROUND

THE PUEBLO UNO REDEVELOPMENT PLANS AND
PROJECT AREA

12. The Pueblo Uno Redevelopment Project was initiated on July 8, 1975 as a project for the *non-assisted redevelopment* in the core area of San Jose under California Community Redevelopment Law. The concept and objective of the Plan was to redevelop the area by attracting private investment. The Redevelopment was to proceed through voluntary cooperation of property owners "without condemnation" with the City providing the needed infrastructure, *especially parking facilities*, through tax increment financing from "all taxes levied upon taxable property within the Project area". The Plan provided that a committee of representatives selected by the property owners in the project area would participate in the formation of plans for development and make recommendations to the City Council before any public hearings were conducted relative to changes in the Plan. Property owners were given rights to participate in the development of the project area, and in a later amendment to the Plan, they were given preference to develop. The Plan was to be in effect for twenty years, to 1995.

13. The Project Area, is pictorially described in Diagram 1, below:



14. The Plan required Planning Department review of all development in the Project Area. Any changes in the Plan and/or land use would require revisions of the Environmental Impact Report and require compliance with State environmental review statutes.

15. A critical provision and policy of the plan was that the City would provide adequate land and facilities for parking in the project area to be used by all who invested in the project area, and would otherwise insure that traffic congestion would be minimized. As an incentive to private development the Project Area was included in Parking District No. 1. Within that district, funds collected from parking revenues generated by City-owned parking lots and garages, tax increments from property owners within the project area, and assessments if needed, were to be used to provide parking facilities, thus enabling developers to build without incurring the expense of providing parking facilities.

16. Thus developers within the Project Area would not need dedicated parking in order to obtain construction and permanent financing for their development because they were assured and could assure lenders that the City would provide parking within the project area.

17. By intent and design, Defendants Redevelopment Agency and City of San Jose restricted the construction of on-site parking facilities for the office building. As stated by those defendants, the purpose of those restrictions was to obtain parking revenues from the City-owned parking lot at Post and Market Streets which was, according to the Plan, set aside for the use of the property owners in the area and was ultimately to be developed as a multi-story parking garage for use of *all* developers and business in the Project Area.

18. On November 17, 1978, the City Council of San Jose acting as the Redevelopment Agency, approved the Pueblo Uno Master Plan which provided for the construction of a multi-story parking structure at Market and Post Streets to encourage private development. The budget for the Project Area provided for this 600 car multi-story garage using funds collected from tax increments from property taxes collected within the project area and revenues from City owned parking facilities.

19. In mid-1981 the Pueblo Uno 1982-1983 budget was published. It provided for funds for the construction of a 600 space garage at Post and Market Streets for use by all Project Area buildings and businesses, replacing the City surface parking lot. The 1983 environmental impact report for Downtown San Jose's, plans through 1995 provided, as a key aspect of the traffic analysis, for a "city garage" at Market and Post Streets, providing 600 necessary parking spaces for the area.

20. Up through 1981 the Plan had successfully attracted private investment and development and increased property values. The Crocker Bank Building, (100,000 sq. ft.) the Swenson Building, (145,000 sq. ft.), the Takamoto Building rehabilitation, (40,000 sq. ft.), and the American Bank and Trust Building, (42,000 sq. ft.), had been or were in the process of being developed. These added approximately 327,000 square feet of

office space to the area, totalling 50 million dollars of private investment (not including plaintiffs investment of \$56,000,000 in their 315,000 sq. ft. building) without the expenditure of any City funds except for customary street and landscape improvements. However the total amount of parking spaces developed by these building owners was less than 200 spaces because the City and Redevelopment Agency requested that the developer rely on the 600 car garage to be built by the City at Market and Post Streets. Thus, by 1981 there was a critical shortage of parking in the Project Area. The City's own parking reports and analysis suggested at least two spaces per thousand square feet of rental office space were necessary to adequately provide for tenants and visitors of the office building.

VII

CHRONOLOGY OF EVENTS AND OVERT ACTS IN FURTHERANCE OF THE CONSPIRACY

21. Each of the acts of defendants and co-conspirators herein described, as well as other acts and practices not presently known to plaintiffs, was done in furtherance of the offenses charged and in furtherance of the challenged actively described in the preceding paragraphs and was done with the primary purpose and intent of unreasonably restraining and monopolizing the trade and commerce described herein. It was the joint and several intent of the defendants and co-conspirators to, and their acts have had the purpose and effect of, accomplishing their conspiracy.

22. In April of 1981, plaintiffs Boone and Fox became interested in developing space in the project area in what was an emerging core business district developed by private investment without condemnation or the expenditure of City funds. They purchased options on two lots on Market Street immediately across from the City parking lot which had been announced in the Plan and budget would be developed into a 600 car garage.

23. They submitted plans to the City and Redevelopment Agency to build two small office buildings on the lots, totalling 96,000 square feet of rentable office space. Up to that time, Boone and Fox's total investment was \$7,000.

24. In the meantime, defendant Koll also became interested in the Pueblo Uno Project Area because of the success of private development that had occurred since the adoption of the Plan in 1975. Koll knew that the Redevelopment Agency had developed a fund of monies from tax increments obtained from property owners in the area and other areas, as well as funds from parking revenues.

25. Sometimes prior to April 1981, the exact date being unknown to plaintiffs, defendant Koll developed their scheme to secure for itself a preeminent position in the market for office space and parking in Central San Jose and the Project Area by restraining and eliminating fair competition and destroying potential and actual competitors of Koll.

26. Koll was aware of the parking space limitation and crisis caused by the development that had already occurred in the Project Area and Koll knew that parking is a critical element in attracting tenants, so Koll set out to conspire with City and Agency officials in order to accomplish their plan to eliminate competition by blocking competitors or potential competitors from access to City parking facilities in spite of the reliance on previous City promises, the Plan, and the Parking District I ordinance, while continuing to induce such reliance.

27. In furtherance of their scheme, Koll created special relationships with City officials, hired key City officials, and made direct payments and other valuable considerations and inducements to City and Agency personnel.

28. In furtherance of the conspiracy in the spring of 1981 Koll met with City and Agency defendants and developed a scheme wherein the Agency would send out letters soliciting bids from developers regarding the Pueblo Uno Project area. However, no project owner in the project area was invited to bid. In fact, Koll gave the Agency officials the names of developers who they knew were not interested in developing the area so that when the Agency sent invitations to these firms they would not bid. Koll, who also received an invitation to bid, thus was the only firm to submit a plan and therefore would be accepted. Koll also conspired with these Agency officials to keep it advised as to any

other developers that contacted the Agency regarding development in the area.

29. In furtherance of the conspiracy, in April and May of 1981 on reviewing plaintiffs' plans, agency officials, insisted that plaintiffs Boone and Fox change their plans, purchase additional land, and construct a much larger building, the largest building in San Jose, (315,000 sq. ft.), more than three times bigger than the one which they originally had planned. Knowing of the critical shortage of parking in the area, plaintiffs sought and obtained multiple promises, assurances and reassurances that City would provide parking in the area. The Redevelopment Agency officials and staff falsely represented that this would be the justification that City needed in order to advance the time for the building of the 600-car parking garage. They stated that that garage would then provide the necessary parking for both the tenants of, and the visitors to, plaintiffs' building. As they had with other developers, they insisted that plaintiffs not plan adequate parking on site because the use of City parking facilities would provide additional revenues to the City and ultimately provide more parking facilities for everyone's benefit.

30. In furtherance of the conspiracy, Agency officials repeatedly but falsely promised plaintiffs that City would construct a parking structure at the Market/Post site owned by City. At various times as plaintiffs' plans and financing proceeded, plaintiffs sought reassurance that the promised parking would be provided. Plaintiffs told Agency and City officials that their construction financing depended on city parking facilities across the street at Market and Post Streets. Plaintiffs needed to borrow approximately \$33,000,000 to build their building with only 150 parking spaces in a two-level subterranean garage. Their plans required that tenants could lease monthly parking in the City garage at Market and Post. Plaintiffs relied on the Pueblo Uno Plan for a 600-car garage, and Parking District I Ordinance. Until mid-1983 and their actual commencement of construction, plaintiffs could have backed out with minimal loss and prior to that time sought, obtained, and relied upon repeated assurances of parking. At each of these times, defendants City and Agency

officials assured plaintiffs that the parking which they needed would be provided.

31. Relying on those promises, Boone and Fox arranged a partnership with plaintiff Goglio, developed plans, sought investors and otherwise acted to prepare to build the requested building. Although Agency and City officials intended that plaintiffs proceed, in fact their ultimate goal was to benefit Koll by trapping plaintiffs in an uneconomic building because defendants knew that plaintiffs would not be provided the promised parking.

32. In furtherance of the conspiracy, a secret agreement was executed on April 8, 1982 between defendants City and Agency with Koll which contained a covenant not to contact other City agencies. Thus, Koll was able to obtain approval of its project without scrutiny of its environmental and traffic impact by the Planning Department, despite the fact that such scrutiny continued to be exercised on all other such developments, including that of plaintiffs. Because defendants City and Agency refrained from giving the statutorily required notice of a public hearing regarding the environmental review of the Koll building, Koll was enabled to build its building on the only available space for public parking facility in the area. Thus, defendants conspired to, and did, deprive other nearby buildings of the parking spaces which defendant City had promised to their owners. This was accomplished without the environmental review process which California law requires for the purpose, among others, of addressing adverse traffic impact. By such action, the California Community Redevelopment Law, § 33000 *et seq.*, § 56035, § 56040 Health and Safety Code, and the California Environmental Quality Act § 21000 *et seq.*, § 21166 Public Resources Code were violated.

33. While Koll proceeded in secret, plaintiffs proceeded publicly. Thus, concurrent with the execution of the above-mentioned secret agreement with Koll in April, 1982, and after full review and public hearings regarding plaintiffs' building plans, the City Planning Department approved those plans *with parking to be provided in a city-built garage*. The Planning Department issued a Negative Declaration finding that plaintiffs' development with the promised parking would have to adverse environmental or traffic impact.

34. On June 2, 1982, the Redevelopment Downtown Coordinator submitted a report to the City Council which provided for the development of the city-owned parking garage and which further provided for joint development and/or condominium ownership with private developers of additional parking space in the core area. That report contemplated that private developers would either participate in the cost of the additional parking or make an "in-lieu" payment. In furtherance of the conspiracy, City and Agency officials emphasized to Boone and Fox that the report of June 2, 1982 assured the commitment to provide parking to them.

35. While Koll's plans continued in secret, it contacted Boone and Fox in June of 1982, allegedly to consider contracting to construct plaintiffs' proposed office building, but in reality to discover and monitor the details of a competitor's plans. In good faith, plaintiffs disclosed all of their plans, including financing information. They also disclosed to Koll their complete reliance upon City's promised provision of a parking garage at Market and Post Streets, including Plaintiffs' reliance for financing purposes. Koll's agents did not disclose to plaintiffs that Koll had already negotiated with the City and Agency officials to exclusively use the property, and to block plaintiffs from all City parking facilities. With the use of plaintiffs' disclosures, Koll and its co-conspirators were enabled to lead plaintiffs into building their enlarged building, and then to undermine them so that they would ultimately be forced to sell out to Koll.

36. On October 8, 1982, at the Pueblo Uno Property Owners Committee meeting, Koll presented its proposed two-phase project. Phase I was to be a 190,000 square-foot office building on the parking lot at Market and Post Streets, with a parking structure behind. Phase II was a 250,000 square-foot office building at the corner of San Fernando and First Streets, with an addition to the above-mentioned garage. That garage was planned to service Koll's two building *only*. The Committee voiced concern about the parking crisis that this proposed development would exacerbate, and referred to the 600-car garage which City had promised to the developers. In furtherance of the conspiracy Agency officials replied that the City would take care of the developers' needs, especially those of Boone and Fox, through

additions to the Market Street garage which was one-and-one-half blocks away from the Project Area.

37. Boone and Fox wanted to have a voice in the recommendations concerning Koll's proposal and the use of the land which had been promised for parking. However, in furtherance of the conspiracy, defendant Frank Taylor, of the Redevelopment Agency, sent a letter to the Pueblo Uno Committee wherein he falsely stated that it would be a violation of state law prohibitions against conflict of interest for either Boone or Fox to become members of the Committee. On December 17, 1982, the Pueblo Uno Committee met again, at which time the Deputy City Attorney and various representatives of the Redevelopment Agency falsely warned that if Boone and Fox participated in the Committee's decisions concerning Koll's project, they would be violating state law. William Benson of Koll also indicated to Committee members his resentment of Boone and Fox's participation in the recommendation process. Minutes and tapes of these public meetings have been altered and/or completely destroyed by the defendants and unnamed co-conspirators in furtherance of the conspiracy.

38. The accommodation of Koll's plan necessitated a substantial change in the Project Area Redevelopment Plan and in the environmental impact report for "Downtown San Jose 1995". Instead of there being essentially private development without condemnation, and with City providing infra-structure, especially parking facilities, City and Agency were to provide Koll with the building site which had been designated for parking in the latest Environmental Impact Report. The scheme and *sham*-amended Redevelopment Plan and sham-condemnation proceedings provided for City's and Agency's transfer to Koll of city-owned land at an artificially low price, less than fair market re-use value, on remarkable terms, i.e., no payment of either principal or interest by Koll until 1995, plus City's condemnation of other land which Koll desired. Other developers in the Project Area had requested the right to develop the same property with private funds but the City and Agency refused and thus violated the California Community Redevelopment Law § 33352 Health and Safety Code which provides in part that if the public improvement can be

accomplished by private enterprise, no expenditure of public funds or condemnation is authorized.

39. In furtherance of the conspiracy in late December of 1982 and early January of 1983, in order to convince plaintiffs not to protest Koll's development, City and Agency officials again assured Boone, Fox and Goglio that they would be provided with parking in the Market Street Garage as an alternative to the Market/Post area. Koll's representatives who had been dealing with Boone and Fox for the construction of the latter's building had also assured Boone and Fox that the alternative, the Market Street garage, was viable and would service the parking needs of the tenants and visitors of Boone and Fox's building although it was one-and-one-half blocks away. City and Agency officials informed Boone and Fox again of the joint venture or condominium concept that was announced by the City and the Parking Advisory Committee on June 2, 1982. They claimed the concept was legal, would enhance Boone and Fox's development, and would allow Boone and Fox to contribute to the construction of the additional levels to the Market Street garage, one of which would then be designated as a dedicated parking level providing 300 spaces for Boone and Fox's building.

40. From February to May 1983, Boone and Fox obtained construction financing in the sum of \$33 million based on the assurances that the City and Agency would provide parking (300 spaces) in the Market Street garage as a joint venture condominium concept as agreed to by Agency officials and supported by the City's documents and proposed ordinances.

41. On May 31, 1983, the construction loan was recorded by Boone and Fox from the Kuman Corporation, and Goglio's conditions were all met. On June 1, 1983, the Planning Commission and Building Department issued a building permit after full review of construction, financing, and parking provisions as discussed with City and Agency officials concerning the Market Street garage.

42. Boone and Fox broke ground and decided to build four levels of underground parking to provide 300 parking spaces on site with the use of 300 parking spaces in addition to the Market

Street garage, giving them a ratio of two parking spaces to every 1,000 square feet of office space. Boone and Fox once again applied to the Planning Commission for permission to build the two extra levels of underground parking totalling 4 levels in a subterranean garage to provide the on-site 300 parking spaces. Once again the circumstances of their parking needs and other related issues were reviewed by the Planning Commission.

43. In an attempt to continue to deceive plaintiffs to believe that a final agreement and understanding had been reached with the City and Agency, on August 5, 1983 City and Agency defendants wrote to Boone and Fox and submitted the cost for the Market Street garage addition.

44. On October 12, 1983, Koll presented their proposal to the Redevelopment Agency in writing, a proposal which, according to an Agency official, had been already secretly agreed to. The proposal provided for the purchase of the City parking lot and four privately owned parcels of land to be acquired by the City on First Street, totalling approximately 60,000 square feet of surface area. The price for all this was only \$4.5 million with final payment in the year 2000 and without payment of any principal or interest on said sum for ten years. The price considering the deferred payment for 10 years was less than the fair market re-use value for the project and in violation of § 33433 of the Health and Safety Code "community Redevelopment Law."

45. On October 14, 1983 at a meeting of the Pueblo Uno Property Owners Committee, Koll's proposal was presented by William Benson and reviewed by the Committee. After considerable discussion, it was stated by the Committee, including Boone and Fox, that Koll's proposal to build an office building was welcome, however Koll did not address the critical issue of adequate parking for the area, and the 840-car garage proposed would not be adequate for providing parking for all the new office buildings already constructed and buildings under construction in the Project Area. Koll and City and Agency officials knew of traffic analysis reports that had been made which indicated that the Koll proposal would cause an adverse traffic impact in the Project Area but these defendants did not advise the committee of said negative analysis.

46. On October 19, 1983, Boone and Fox's final application for a site development permit for their fourteen-story office building was approved with the inclusion of a four-level subterranean garage to provide 300 on-site parking spaces, with 300 more to be provided by the addition to the Market Street garage and paid for by Boone and Fox. In furtherance of the conspiracy up to November 15, 1983, City and Agency officials reassured Boone and Fox that they would get the addition in the Market Street garage upon pro rata payment, and that they should not object to Koll's proposal when it was placed before the City Council on November 15, 1983.

47. On November 15, 1983, a public hearing was held before the City Council to substantially amend the Plan and change land use to allow eminent domain and no longer require Planning Department design and review process for proposed development. No environmental impact or traffic impact studies or review of the proposals were ever submitted or considered by the City Council. The hearing was continued to December 6, 1983.

48. Also in November 1983, Boone and Fox had provided a copy of the appraisal report for their Market/Post Street Tower office building which was based in part on the 300 parking spaces on site in the subterranean garage and 300 parking spaces in the Market Street garage that Boone and Fox would pay for. The value of the building was \$56 million with the parking as an integral asset in the evaluation. City and Agency officials provided Boone and Fox with the 1983-1984 program budget which included the provision for the building of additional two levels on the Market Street garage by the City.

49. In furtherance of the conspiracy, on November 23, 1983, Boone and Fox were guaranteed by Agency officials that if they did not oppose the amended Plan to be adopted on December 6, their parking in the Market Street garage was assured, and all that was left to be determined was whether the construction would be concrete or steel and whether it would be two or three levels. Boone and Fox agreed to pay their pro rata share of the cost of the addition to the Market Street garage. Boone and Fox's payment would have assisted the City in obtaining bond financing for the balance of the entire cost.

50. On December 2, 1983, the Pueblo Uno Property Owners Committee met at a public hearing and announced their opposition to the proposed amended Redevelopment Plan and Koll's development proposal. The Committee sent its letter on December 3, 1983 to the City Council announcing their decision.

51. At the December 6, 1983 public hearing, the City Council sitting as the Redevelopment Agency, in part because of Koll's secret agreement and conspiracy, approved the proposed amended plan, "Resolution 2316", for the acquisition of four properties on First Street through eminent domain proceedings. This allowed Koll to go forward with Phase I of its planned 244,000 square-foot office building development with a garage of 800+ spaces to service its building. Members of the Pueblo Uno Property Owners Committee protested the proposed amendment and development.

52. In January 1984, the City published a report supporting the concept of a privately owned joint venture development of parking facilities with the City and private developers.

53. On January 2, 1984, a downtown San Jose parking analysis was submitted to the City, which stated the real parking needs in the area were at least four cars per 1,000. The reports indicated the urgent need for parking to be developed by the City in downtown San Jose. They also supported the joint venture, condominium ownership concept to be paid for by private developers such as envisioned in the Boone/Fox agreements with heads of the Redevelopment Agency and the parking coordinator. In furtherance of the conspiracy copies of the reports were provided by Agency officials to Boone and Fox as further evidence of the lawfulness and feasibility of the agreement.

54. The 1984-1985 Program and Budget for the City of San Jose provided for a parking solution with Boone and Fox's Market/Post Street Tower, and was presented in furtherance of the conspiracy as additional evidence by Agency officials to Boone and Fox to support all the promises Boone and Fox had relied on to develop their office building.

55. On March 21, 1984, the Downtown Parking Management Ordinance was passed by the City Council of San Jose to "provide parking off site within a reasonable walking distance

under a joint venture agreement". City and Agency officials in furtherance of the conspiracy once again used the passage of the Parking Management Ordinance as further support of the City's and Agency's commitment to the obligation negotiated with Boone and Fox and which Boone and Fox relied upon.

56. On March 29, 1984, the City Council/Redevelopment Agency approved an agreement with defendant Koll Company for the latter's development in the Pueblo Uno Project Area, and adopted a resolution and Ordinance 57333 at the request of Taylor in furtherance of the conspiracy certifying that the Koll development would not result in such substantial or potentially substantial changes in the environment as to require either revisions in the environmental impact report entitled "Downtown San Jose 1995" or a negative declaration. Although § 56035 of the Health and Safety Code required that notice of the March 29, 1984, hearing regarding environmental impact review be given to businesses and property owners in the area, in furtherance of the conspiracy, no such notice was given.

57. In furtherance of the conspiracy, Taylor represented to the Legislative body that the Koll project was considered in the "Downtown San Jose" 1995 Environmental Impact Report when in fact the report shows the Market/Post Street property given to Koll was to be a 600 car "city garage" for use by all property owners in the area, and was a critical element in solving the traffic and parking problems for the Core Area. In fact, the report was published in 1983 before the Koll project was approved and was intended to be the City plan until 1995. Therefore, Taylor misrepresented to the Council in order to avoid the issues of the substantial change and need for a new environmental review because of the adverse traffic impact caused by the Koll project taking away all the parking areas. Taylor and Koll also knew of a traffic analysis report, indicating the Koll project would have a substantial adverse traffic impact on the area and purposely did not disclose the information to the council.

58. In furtherance of the conspiracy defendant Koll and Taylor also misrepresented to the City legislative body that a larger garage could not be built at the Koll site when in fact more than an additional 600 spaces could be added to the garage to

provide for the other buildings, including plaintiffs', in the Project Area.

59. Also in furtherance of the conspiracy, false appraisals and financial analysis were presented to the legislative body by Taylor indicating that the re-use value of the land given to Koll was only \$1,700,000 in 1984 when in fact it was in excess of \$5,000,000 at the time. Furthermore, since Koll was not paying principal and interest for the land until 1995 when the real value of the land alone would be in far excess of \$15,000,000, the sale to Koll for \$4,500,000 on those terms was in violation of § 33433 Health and Safety Code, Community Redevelopment Law, because the fair market re-use value at the time was really \$5,000,000 and not \$1,700,000 as the false report and analysis represented.

60. The defendants, including Taylor and Koll represented to the legislative body that the profits of the Koll development were fair and would not exceed 18% when at the same time Koll was representing to potential equity partners that they could expect excessive monopolistic profits in excess of 50%.

61. In furtherance of the conspiracy, on April 4, 1984, City and Agency officials wrote to Boone telling him that the City decided to build three levels utilizing steel and that all the arrangements were complete for the construction of the Market Street addition for Boone's use and payment. On April 5, 1984, City and Agency officials provided Boone with a copy of the memorandum of the Parking Committee concerning the Market Street garage feasibility study and once again stated, "All systems are go."

62. In furtherance of the conspiracy, the City officials wrote to Boone assuring that the City was going forward with the completion of their commitment to Boone for the expansion of the Market Street garage, a portion of which was to be paid for by Boone. A report by Frank Taylor, was used in furtherance of this conspiracy, dated May 23, 1984, additional evidence that financial arrangements were being made by the City to complete the garage using Boone and Fox's contribution. This was approximately within 60 days after the adoption by the legislative body of the Koll development agreement on March 29, 1984, City Ordi-

nance § 57333. The defendants in furtherance of the conspiracy intended to deceive plaintiffs so that the 60 day period for objecting to the Koll development and Resolution 57333 would expire and thus block plaintiffs from judicial review.

63. In late July of 1984, Boone was told by a prospective tenant that the tenant was told by agents of Koll and equity partners of Koll that Boone did not have the promised parking at the Market Street garage and Koll was using this information to attract tenants because of the lack of parking in the Boone building.

64. Concerned upon receiving the information stated in paragraph 63, on August 7, 1984 Boone wrote to City officials to be assured that the Market Street garage addition promised to Boone was "still a go." Boone once again stated in the letter he was willing to pay one-third of the total cost of the addition to the garage. Boone again met with city officials and after they received the letter and in furtherance of the conspiracy they assured Boone that "everything looks good. We're just going to get it written up and it's done."

65. On August 30, 1984, the Redevelopment Agency met to address the issue of the 1984-1985 budget which included "negotiating parking solution for the Boone building." After the meeting, Agency officials in furtherance of the conspiracy continued to assure Boone that all systems were go, although no formal report was published from the meeting, nor have there been any minutes written up to the knowledge of plaintiffs.

66. As a result of the conspiracy in September, 1984, Koll bought the American Bank and Trust building located immediately opposite the Market/Post Streets property that Koll was to develop. The American Bank and Trust building did not have any parking when it was built and had always relied on the building of the Market/Post Street garage by the City. Koll had total control of all the parking facilities available in the Project Area, and no developer could compete in providing parking for tenants and visitors.

67. In November, 1984 Koll executives announced a "Blood Bath" in competition for downtown office space rental market.

Koll anticipated that by being first to complete, plaintiffs might succeed in contracting with desirable tenants based on the belief that there would be a parking arrangement utilizing the Market Street garage. To prevent plaintiffs' building from absorbing the limited supply of office building tenants, Koll demanded that the Agency renege. In response to that demand, the Agency then formally reneged on its promise to plaintiffs of this alternate parking. Such action was without any rational relationship to any permissible interest in the City.

68. In furtherance of the conspiracy, in January 1985, an agent for Grubb & Ellis approached Boone and indicated that he had an undisclosed principal who was willing to buy the Boone building at a distressed price for \$45 million. The price was more than \$11 million less than its fair market value because Boone could not provide adequate parking for his building, and he was having problems with the City. Although formal discovery has been denied plaintiffs in this action, informal discovery has revealed on April 26, 1985 that Donald Koll, the president of Koll, owns the maximum interest that an individual can own in Grubb & Ellis. Plaintiffs also were informed that the tapes of the hearings before the Planning Commission in April, 1982 when the commission addressed the parking need of plaintiffs and the traffic impact to the project area have been *erased*. Plaintiffs were informed on April 22 that minutes and tapes of Pueblo Uno Committee meetings were destroyed.

69. Plaintiffs building will be completed by August 15, 1985 and plaintiffs must pay off their construction loans of 33 million dollars within 6 months of the completion of the building. In order to meet these and other obligations, plaintiffs must obtain at least 300 additional parking spaces off site.

VI

VIOLATIONS ALLEGED

70. Beginning at a time unknown to plaintiffs, defendants, others acting for defendants, and their co-conspirators, have been and now are engaged in:

(a.) A combination agreement and conspiracy to unreasonably restrain the interstate commerce in the market for purchasing, owning, constructing, and/or developing and renting office space with parking facilities in San Jose in violation of Section 1 of the Sherman Act;

(b.) A combination and conspiracy to monopolize and destroy competition the interstate commerce in the market for purchasing, owning, constructing, and/or developing and renting office space with parking facilities in violation of Section 2 of the Sherman Act.

71. Each of the acts of defendants and co conspirators herein described, as well as other acts and practices not presently known to plaintiffs, was done in furtherance of the offenses charged in the preceding paragraph and was done with the *primary purpose and intent of unreasonably restraining the trade and commerce described herein*. It was the joint and several intent of the defendants and co-conspirators to, and their acts have had the purpose and effect of:

(a.) eliminating plaintiffs and others as competitors of Koll; and

(b.) totally destroying the economically viable use of plaintiffs' investment-backed expectation property right.

VII

INJURY TO PLAINTIFFS

72. As a direct and proximate result of the said conspiracy, plaintiffs are unable to fairly attract tenants and will be unable to operate economically in order to service their debt and operating expenses and compete in the market for office space in Central San Jose and Koll will ultimately own or control their property as well as that of other competitors in said market. Plaintiffs' damage is continuing but can be reasonably estimated and is expected to exceed \$56 million.

73. As a further direct and proximate result of said conspiracy plaintiffs will be unable to obtain take out, interim or permanent financing with which to repay their construction loan which is due

and payable within 6 months of completion of plaintiffs' building and thus face the total loss of the economically viable use of their investment backed expectation, and/or will be forced into bankruptcy as Koll has threatened.

74. Plaintiffs have no adequate remedy at law so that unless this Court immediately takes the following actions plaintiffs' property right of economically viable use of their investment-backed expectation and property will be totally destroyed.

(a.) That defendants, their successors, assigns, transferees, officers, directors, members, agents, and employees, and all persons acting or claiming to act on behalf thereof, be permanently enjoined and restrained from directly or indirectly continuing, maintaining, or renewing the unlawful combinations, conspiracies, and attempt to monopolize alleged herein, and from engaging in another combination or conspiracy having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect;

(b.) That defendants City and Agency be ordered to permit plaintiffs to joint venture a dedicated portion of the Market Street Garage paying a pro-rated share of the expense in accord with the policy and intent of the Parking Management Ordinance passed on March 21, 1984 and in the interim until the Market Street garage addition is completed, plaintiffs be allowed to lease from the City 300 parking spaces at prevailing rates either in the existing Market Street garage, and/or in the Koll project garage or in nearby City facilities and parking lots.

(c.) That defendant Koll, its agents, etc. be enjoined from continuing to build the garage on the property given to them until an analysis can be made of enlarging the garage to provide a fair and equitable pro-rata share of parking space to Koll, plaintiffs and all other building owners in the Pueblo Uno Project Area.

(d.) That a constructive trust be imposed on the garage presently given to Koll for its exclusive use until environmental and traffic impact reviews made of the traffic impact of

the Koll project which has eliminated all other buildings in the area from the use of the parking facilities and thus has caused an adverse traffic impact and that plaintiffs be awarded reasonable attorney's fees and costs pursuant to § 1021.5 of the California Civil Code of Procedure.

Wherefore, plaintiffs pray judgment as hereinafter alleged.

COUNT TWO
CIVIL RIGHTS ACT

[Title 42, USC Sec. 1983]

75. Plaintiffs, by reference, here incorporate by reference the allegations of paragraphs 1 through 74.

76. Defendants City Redevelopment Agency, Taylor and unnamed co-conspirators in combination and conspiracy with defendant Koll, acting under the color of Community Redevelopment Law, City Ordinances and Resolutions including Resolution 2311 and Ordinance 57333, a sham amended redevelopment plan, and sham condemnation proceeding arbitrarily and discriminatorily deprived plaintiffs of due process and equal protection of law and of their property rights, including the economically viable use of their investment backed expectations, by various means including the following.

(a) Arbitrarily and discriminatorily deprived plaintiffs of due process and equal protection of the Community Redevelopment Laws, § 33000 of Health and Safety Code, when they induced plaintiffs to build the largest office building in San Jose with the promised protection of the policy and intent of the Community Redevelopment Law which is intended to protect developers who have made their investment in redevelopment areas.

(b) Arbitrarily and discriminatorily deprived plaintiffs of due process and equal protection of the Parking District I parking ordinance, which was in effect at the time plaintiffs made their investment and acquired their property right of economically viable use of their investment and similarly deprived plaintiffs of the protection of Parking Management

Ordinance passed on 3/21/84 which announced the policy and intent to provide for joint venture development of parking garages with private developers and the City.

(c) Plaintiffs have been arbitrarily and discriminatorily deprived of due process and the equal protection of law because tax increments from property taxes paid by plaintiffs and other developers in the project area were not used according to the Redevelopment Plan and were instead unlawfully diverted to Koll for its exclusive use and profit in violation of § 33433 of the Health & Safety Code.

77. Defendants City and Agency officials and Taylor and others, having knowledge of the conspiracy to deprive plaintiffs of due process and equal protection of law and property right of economically viable use of their investment, and having the power to prevent those wrongs, neglected and refused to act to prevent the wrongs.

78. As the direct and proximate result of said defendants' actions, conspiracy, and neglect, plaintiffs have been injured in that the economically viable use of their building is totally destroyed as described herein. Said damage is continuing but can be reasonably estimated and expected to exceed \$56 million dollars.

79. Defendants caused such damage and are therefore liable, pursuant to the aforesaid Civil Rights Act of 1871, Title 42 USC Sec. 1983, in the amount of said damage. The individual plaintiffs and KOLL are also liable for punitive damages in the sum of \$100 million.

COUNT THREE

(PROMISSORY RELIANCE)

80. Plaintiffs, by this reference, here incorporate the allegations of paragraphs 1 through 79 above.

81. Defendant City, and Redevelopment Agency, acting through its agents, made numerous promises and representations to plaintiffs, including those alleged above. The substance of the promises as stated in Count One was that, in one way or another,

adequate parking space would be provided for an office building of the size plaintiffs were induced to plan, develop and build. When making those promises and representations, the City and Agency knew the true facts concerning plaintiffs' plans, Koll's plans and the planned provision for parking.

82. Defendant City, and Redevelopment Agency, when making the aforesaid promises and representations, intended that plaintiffs would rely upon those promises and by continually reassuring plaintiffs and by other means acted in such a way that plaintiffs reasonably believed that the City and Agency intended that plaintiffs should rely upon those promises.

83. Plaintiffs were ignorant of the true state of facts and continually believed that adequate parking would be provided, that the City and Agency were negotiating in good faith, and that the City and Agency would act as promised.

84. Plaintiffs relied upon the promises and representations of the City and Agency and as a result have been and are continuing to be injured in an amount which is not now certain but which can be reasonably estimated and expected to exceed \$56 million dollars.

85. Defendant City's and Agency's failure to provide parking space without any rational relationship to any permissible interest of the City will injure rather than benefit the public. No policy adopted to protect the public will be defeated by a requirement that the City and Agency either provided for parking as promised and according to the policy and intent of the Parking Management Ordinance or pay such damages as will permit plaintiffs to provide for such parking.

86. Plaintiffs, in effect, complied with Government Code §§ 905 and 911.2 by the service of the Complaint heretofore filed with this Court in December, 1984. Plaintiffs filed their claim against the City of San Jose pursuant to Article 2 of Government Code section 911.2 simultaneously with the filing of their "First Amended Complaint", within the one-year period after the occurrence of the cause of action, which was November, 1984 (a copy of which is attached to the First Amended Complaint and marked Exhibit "B"). Further compliance would be useless and an

additional claim against the Redevelopment Agency separately is not required in that Defendant City and Redevelopment Agency have clearly refused all of plaintiffs' claims and have both denied in their answers to plaintiffs' original complaint "that any commitments regarding parking facilities were made to plaintiffs." Plaintiffs' claim was again denied by the City of San Jose on April 29, 1985.

FOURTH CAUSE OF ACTION (INVERSE CONDEMNATION)

87. Plaintiffs, by reference, here incorporate the allegations of paragraphs 1 through 86 above.

88. At all times mentioned herein, plaintiffs were the owners of three parcels of real property within the Pueblo Uno project area located at 55 South Market Street in the City of San Jose.

89. By reason of the action and conduct as alleged herein in paragraphs 1 through 86, and the adoption of Resolution 2316 and Ordinance 57333 by the City legislative body, plaintiffs have been and will be damaged by Defendant City's and Agency's conduct and plaintiff's property right to enjoy its economically viable use of his investment-backed expectation will be totally destroyed. Defendants' acts and plaintiffs' reliance on the City's and Agency's promise, as stated herein, have caused the diminution of the value of property, lost income, lost profits, lost investment expectations and loss of good will in a sum of excess of \$100 million.

90. Plaintiffs have received no compensation for the damage to their property.

91. Plaintiffs have incurred and will incur attorney's, appraisal and engineering fees because of these proceedings in amounts that cannot as of yet be ascertained, which are recoverable in this action under the provisions of § 1036 of the Code of Civil Procedure.

Wherefore, Plaintiffs pray for judgment as follows:

1. For Count One, against Defendant Koll for damages in the amount of \$56,000,000, said damages to be trebled according to law, and for attorney's fees;

2. Plaintiffs have no adequate remedy at law so that unless this Court immediately takes the following actions plaintiffs' property right of economically viable use of their investment-backed expectation and property will be totally destroyed.

(a.) That Defendants, their successors, assigns, transferes, officers, directors, members, agents, and employees, and all persons acting or claiming to act on behalf thereof, be permanently enjoined and restrained from directly or indirectly continuing, maintaining, or reviewing the unlawful combinations, conspiracies, and attempt to monopolize, as alleged herein, and from engaging in other combination or conspiracy having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect;

(b.) That defendant City be ordered to permit plaintiffs to joint venture a dedicated portion of the Market Street Garage paying a pro-rated share of the expense, in accord with the policy and intent of the Parking Management Ordinance passed on March 21, 1984, and in the interim until their Market Street garage addition is completed, plaintiffs be allowed to lease from the City 300 parking spaces at prevailing rates either in the existing garage, and/or in the Koll project garage or in nearby City facilities and parking lots.

(c.) That defendant Koll, its agents, etc. be enjoined from continuing to build the garage on the property given to them until an analysis can be made of enlarging the garage to provide a fair and equitable pro-rata share of parking space to Koll, plaintiffs, and all other building owners in the Pueblo Uno Project Area.

(d.) That a constructive trust be imposed on the garage presently given to Koll for its exclusive use until environmental and traffic impact reviews have been made of the traffic impact of the Koll project which has prevented all other

buildings in the area from using the parking facilities and thus has caused an adverse traffic impact and that plaintiffs be awarded reasonable attorney's fees and costs pursuant to § 1021.5 of the California Civil Code of Procedure.

3. For Count Two, against all defendants, compensatory damages in the amount of \$56,000,000 and attorney's fees; and punitive damages against defendants Koll and Taylor in sum of \$100,000,000;

4. For Count Three, against defendants City and Agency, damages in the amount of \$56,000,000;

5. For Count Four, damages, including attorney's and other fees according to proof as authorized by statute;

6. For interest, costs, fees as provided by law and all other relief as the Court may deem just and equitable.

Dated: July 25, 1985

Law Offices of Herbert F. Kaiser

/s/ HERBERT F. KAISER
Herbert F. Kaiser
Attorney for Plaintiffs

Pursuant to Rule 38 B of the Federal Rules of Civil Procedure, Plaintiffs hereby demand trial by jury.

/s/ HERBERT F. KAISER
Herbert F. Kaiser
Attorney for Plaintiffs

CERTIFICATION

Pursuant to Federal Rules of Civil Procedure 11, I, Herbert F. Kaiser, certify that there is good grounds to support this Second Amended Complaint and it is not interposed for delay and I have complied with all the rules, procedures and policies as stated in Federal Rule of Civil Procedure 11.

/s/ HERBERT F. KAISER
Herbert F. Kaiser
Attorney for Plaintiffs

Appendix D

Herbert F. Kaiser, Esq.
Law Offices of Herbert F. Kaiser
Alcoa Building, Suite 1250
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 392-2255
Attorney for Plaintiffs

United States District Court
Northern District of California
NO. C-84-20772 WAI

David A. Boone and Stephen P. Fox, individually and as
general partners of DSC-3 Group, a California Limited
Partnership, as general partners of Market/Post, Ltd., a
California Limited Partnership; Dave Goglio and Donald
Goglio, individually and as general partners of Three G's a
California Limited Partnership,
Plaintiffs,

vs.

Redevelopment Agency of the City of San Jose, a Public Body
Corporate and Politic of the State of California; City of San
Jose, a Municipal Corporation and Subdivision of the State of
California; Frank Taylor; the Koll Company,
a California Corporation,
Defendants.

Date: October 8, 1985

Time: 9:00 a.m.

Court Room: Honorable William A. Ingram

Supplemental Declaration of Herbert F. Kaiser in Support of
Plaintiffs' Counter-Motion for Order Severing Hearing and in
Opposition to Motions of Defendant City for Rule 11 Sanctions
and for Order Striking Certain Portions of the
Second Amended Complaint
[Filed Sept. 17, 1985]

Clerk's Record Docket No. 90

I, Herbert F. Kaiser, hereby declare under penalty of perjury that:

1. I am a member of the bar of the State of California, I am admitted to practice in this court, and I am the attorney for plaintiffs herein. I make this declaration of my own personal knowledge, I am competent to testify to the matters stated herein, and if I am called as a witness I will so testify.

2. I personally took the enclosed photographs between February and May of 1985, in the Pueblo Uno Redevelopment Project Area. They show the nature of the area and of the injury to all surrounding office buildings which defendant Koll's monopoly of parking has inflicted.

1. Picture 1 shows the Koll marketing poster which offers an 800-car garage for tenants of and visitors to Koll's building.

2. Picture 2 shows the area behind the Koll building which has been set aside for Koll's parking garage and which extends all the way to the next block, First Street.

3. Picture 3 shows the area which has been set aside for Koll's parking garage and the fact that the Takamoto building, which comes right up to the building line of the garage, is landlocked and without any areas for parking.

4. Picture 4 shows the back of the American Bank and Trust building, which is immediately next to the Koll building, and the fact that the building was also built up to the street without any room for parking.

5. Picture 5 is another view of the American Bank and Trust building and the back alley of the Crocker Bank building which shows that both buildings were built up to street line without any room for parking.

6. Picture 6 shows the fronts of the Crocker Bank building and American Bank and Trust building, and the fact that both are built up to the street line.

7. Picture 7 shows the back of the Crocker building, and the fact that it was built up to the back street line without any room for parking.

8. Picture 8 is a front view of the Crocker Bank building, with the American Bank and Trust and Koll buildings further down the street next to each other.

9. Picture 9 shows the front of the American Bank and Trust building which was purchased by Koll in September, 1984, and the fact that it was built up to the street line immediately next to the Koll building, and without any room for parking.

10. Picture 10 is a front view of the Takamoto building which was built up to the street line and immediately adjacent to the Koll building without any room for parking.

11. Picture 11 is a front view of the Takamoto building which shows the limited amount of space which exists between the Koll and Takamoto buildings.

12. Picture 12 is another front view of the Crocker Bank and American Trust buildings which were built right up to the Market Street line.

13. Picture 13 is a front view of the Carl Swenson building which was built right up to the street line and immediately next to plaintiffs' Market/Post Street Tower building.

14. Picture 14 is a view of the church, the Takamoto building, the Koll building and the American Bank and Trust building with the Crocker bank building sandwiched closely together without any room for parking, and it also shows that the area was not blighted.

15. Picture 15 shows the back end of the Carl Swenson building and plaintiffs' Market/Post Street Tower building, and the fact that both buildings were built up to the street line without any room for parking behind.

16. Picture 16 is a front view of the plaintiffs' Market/Post Street Tower which goes right up to the street line; and

17. Picture 17 shows the entire Pueblo Uno Redevelopment Project Area down Market Street, including the Crocker Bank building, the American Bank and Trust building, the Koll building, and plaintiffs' building, and it also shows that the area was not blighted.

A-69

Executed in San Francisco, California, this 17th day of September, 1985.

Herbert F. Kaiser

A-70



Sixty South Market

15 STORY
200,000^{sq}
OFFICE BUILDING
800 CAR GARAGE

KOLL

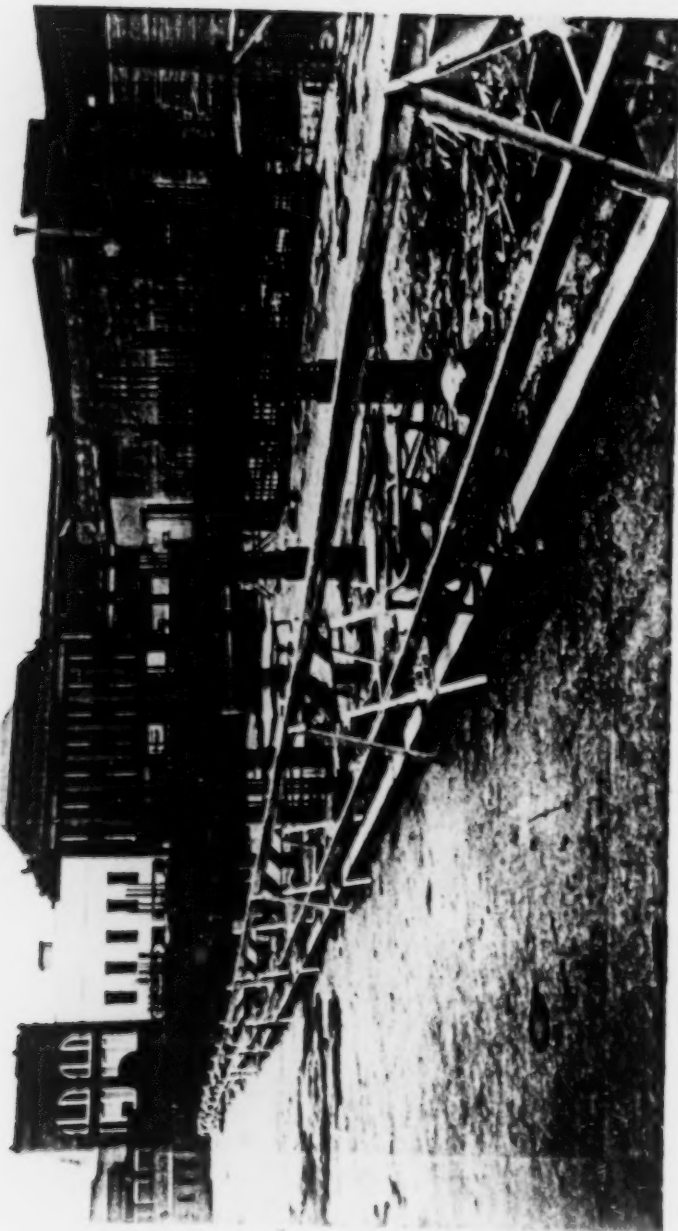
COMPLETION
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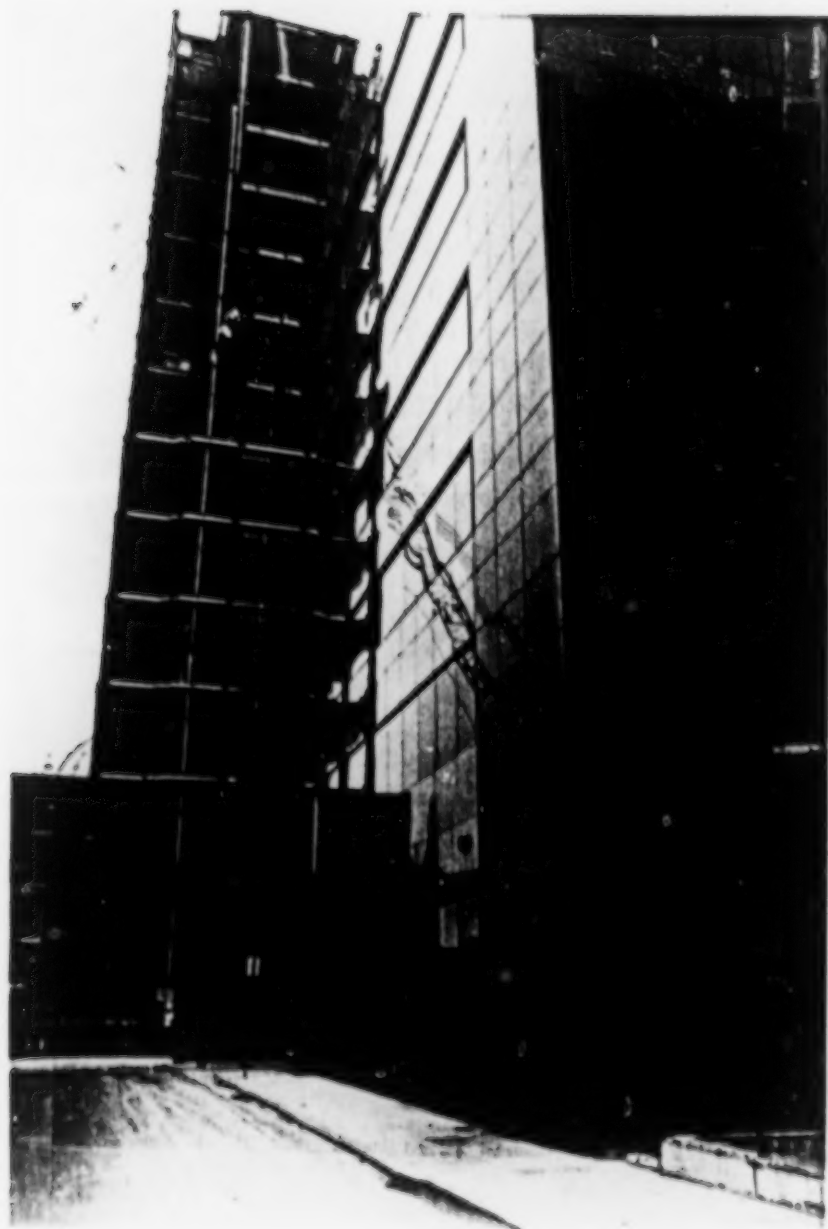


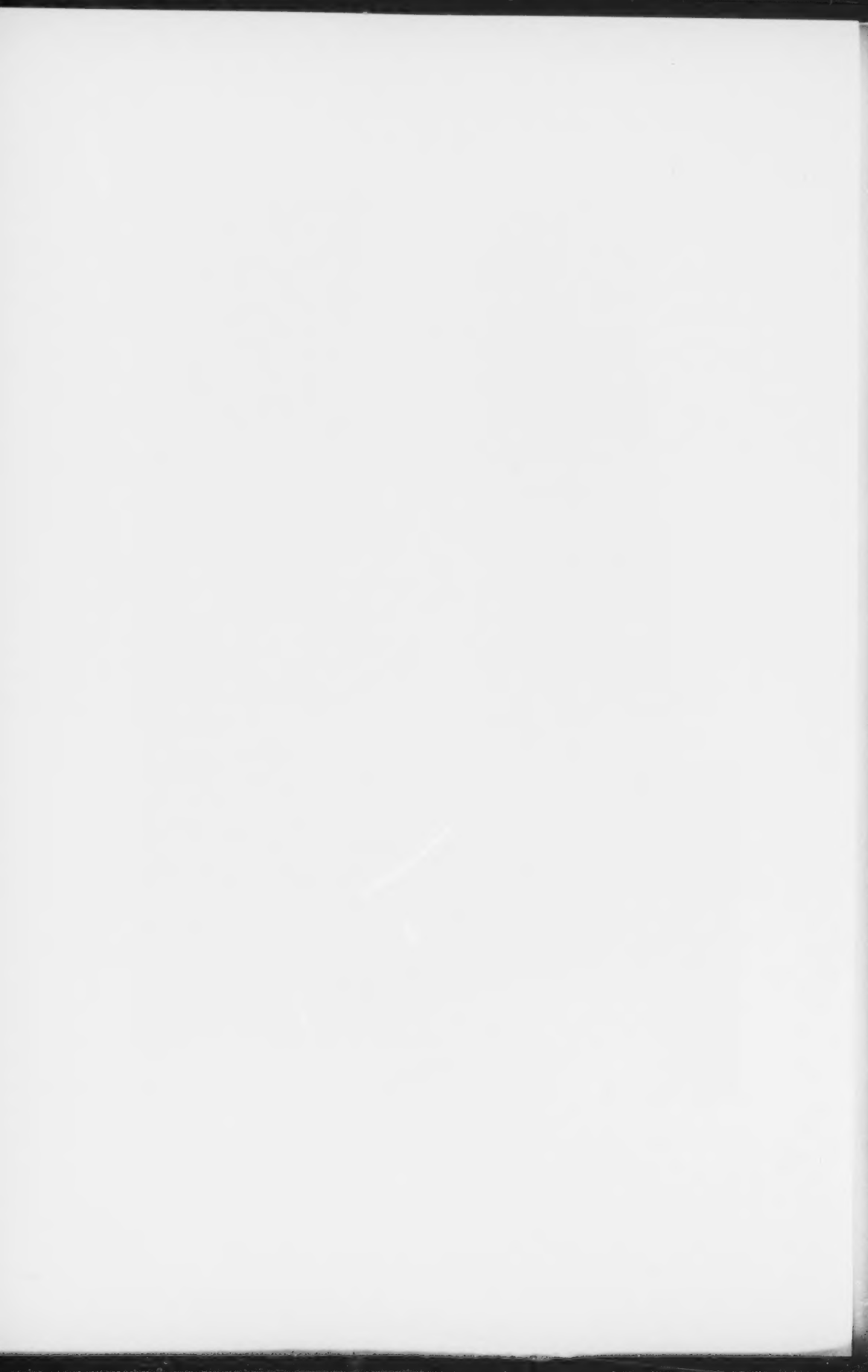
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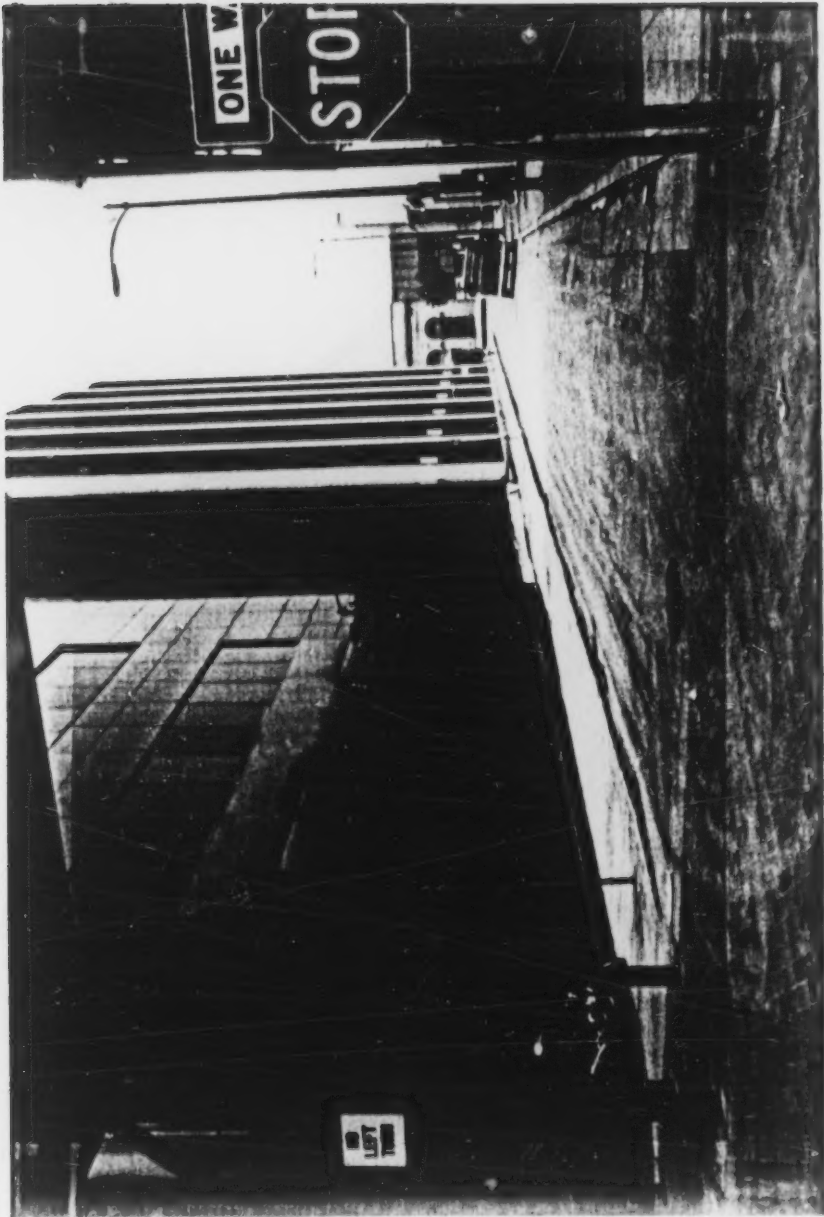


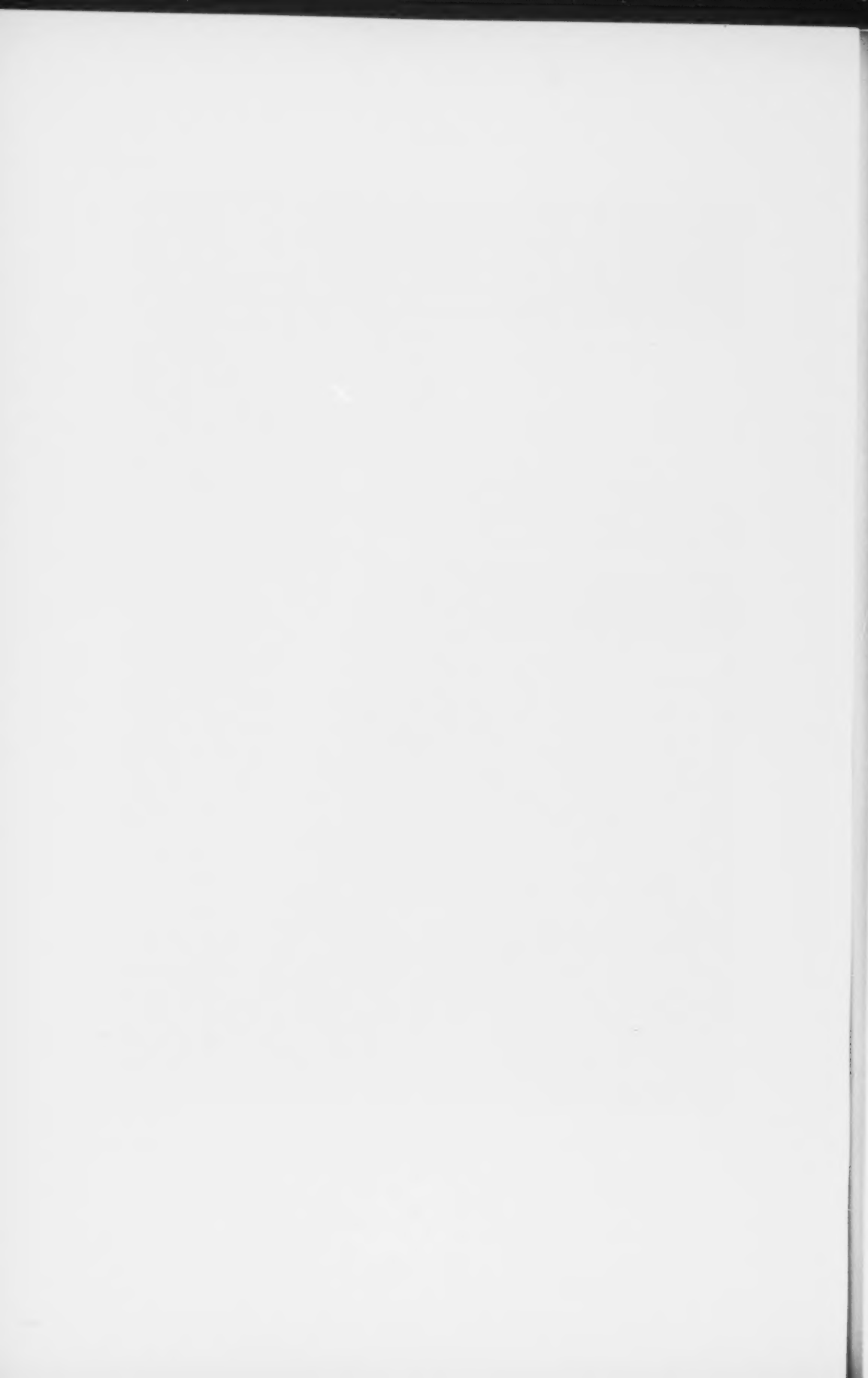
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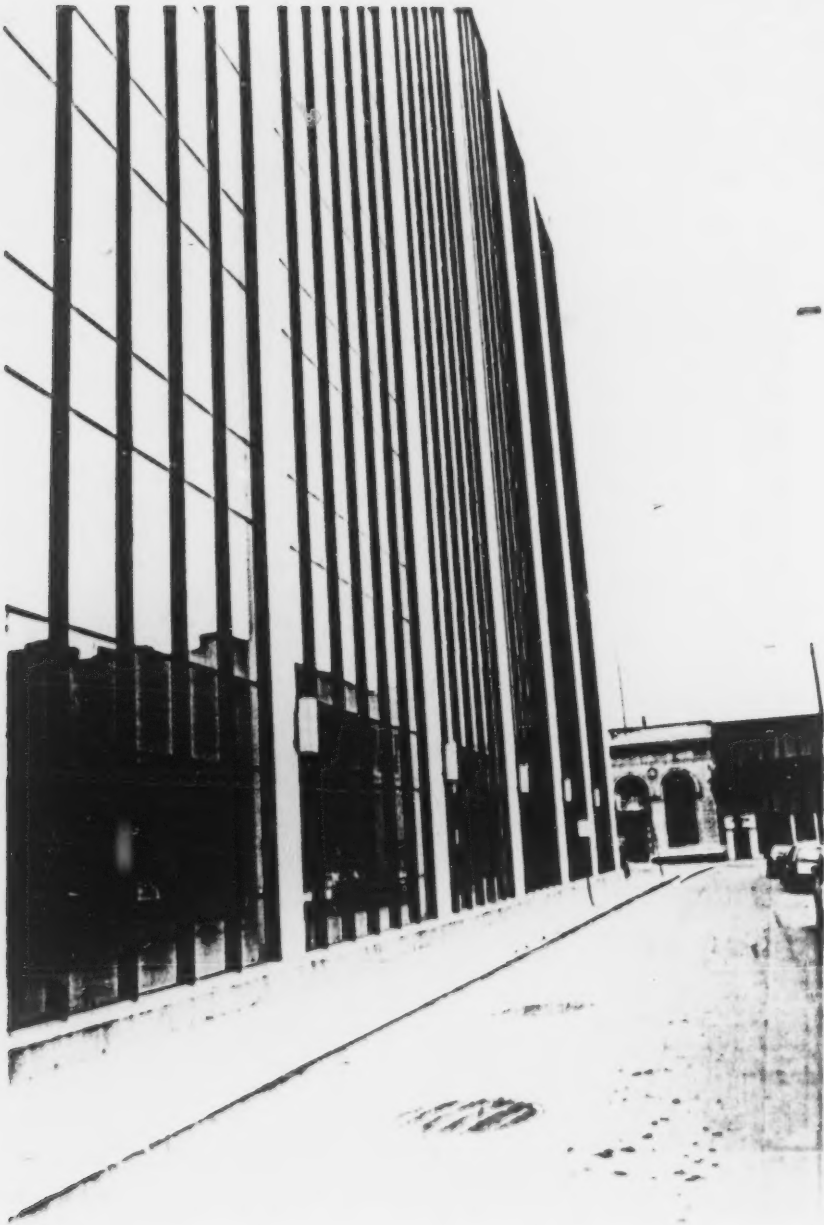


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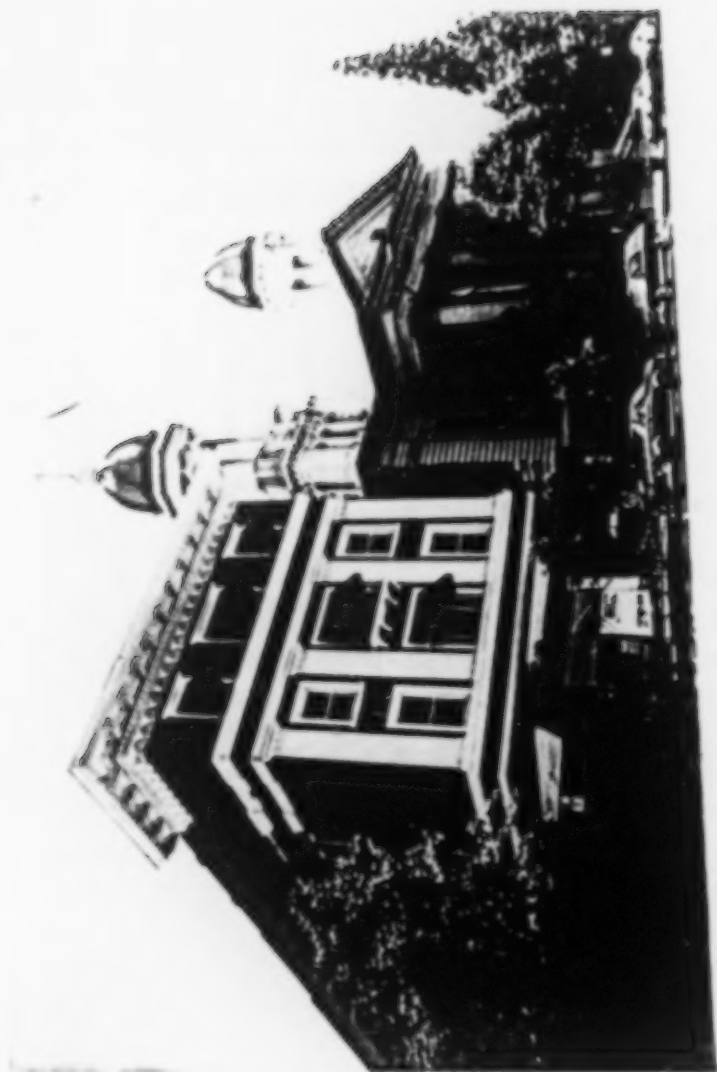


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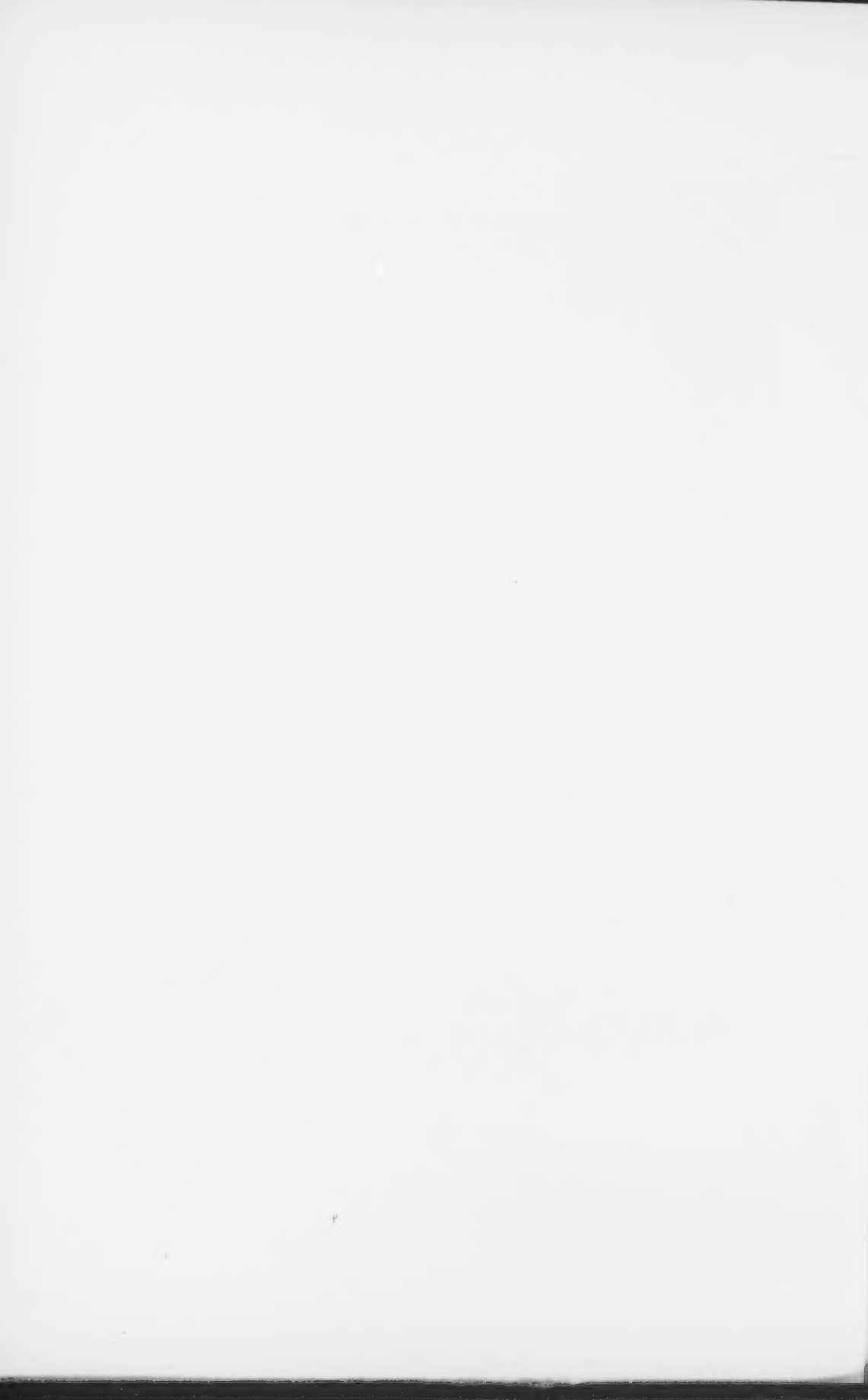
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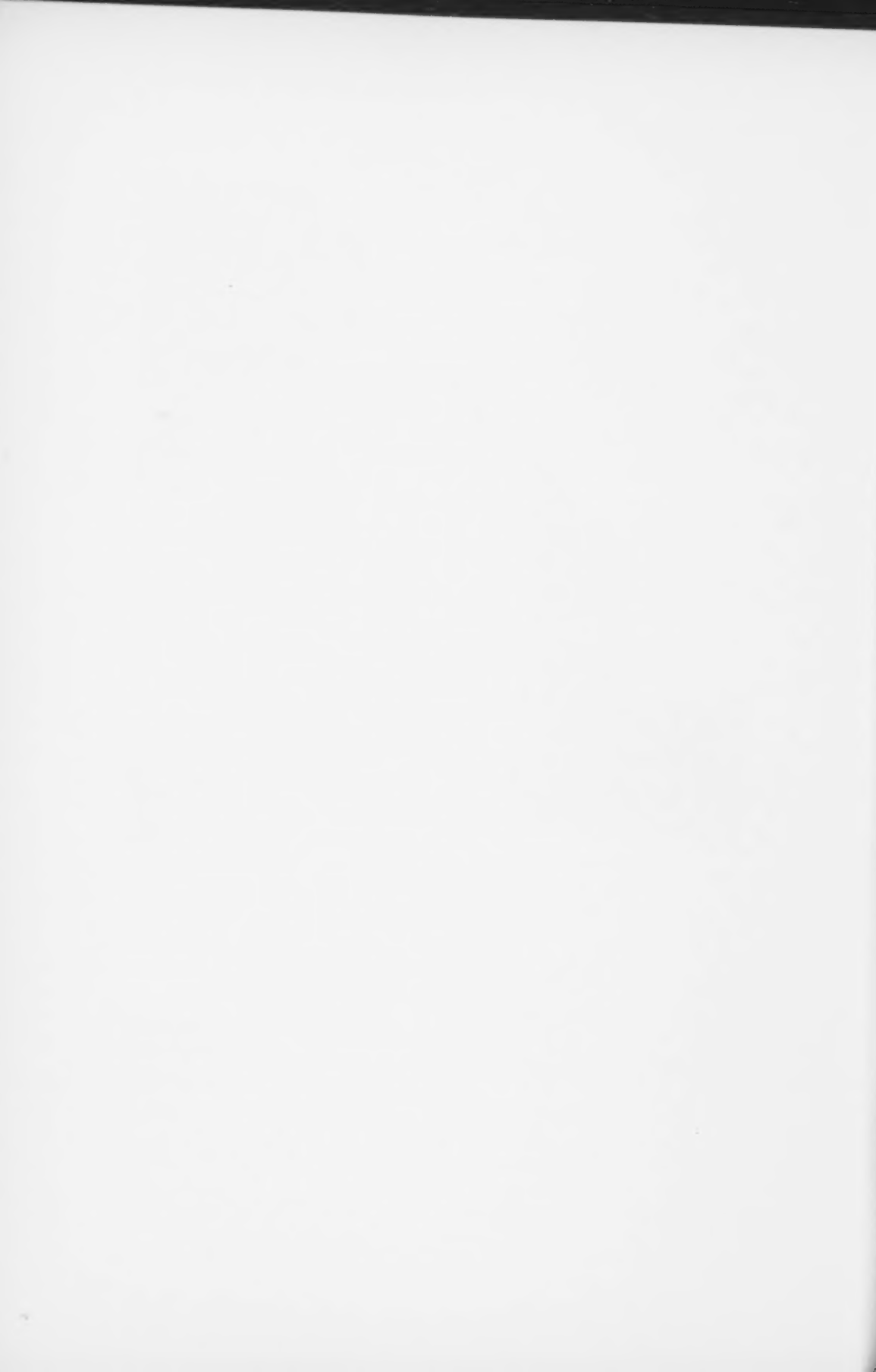
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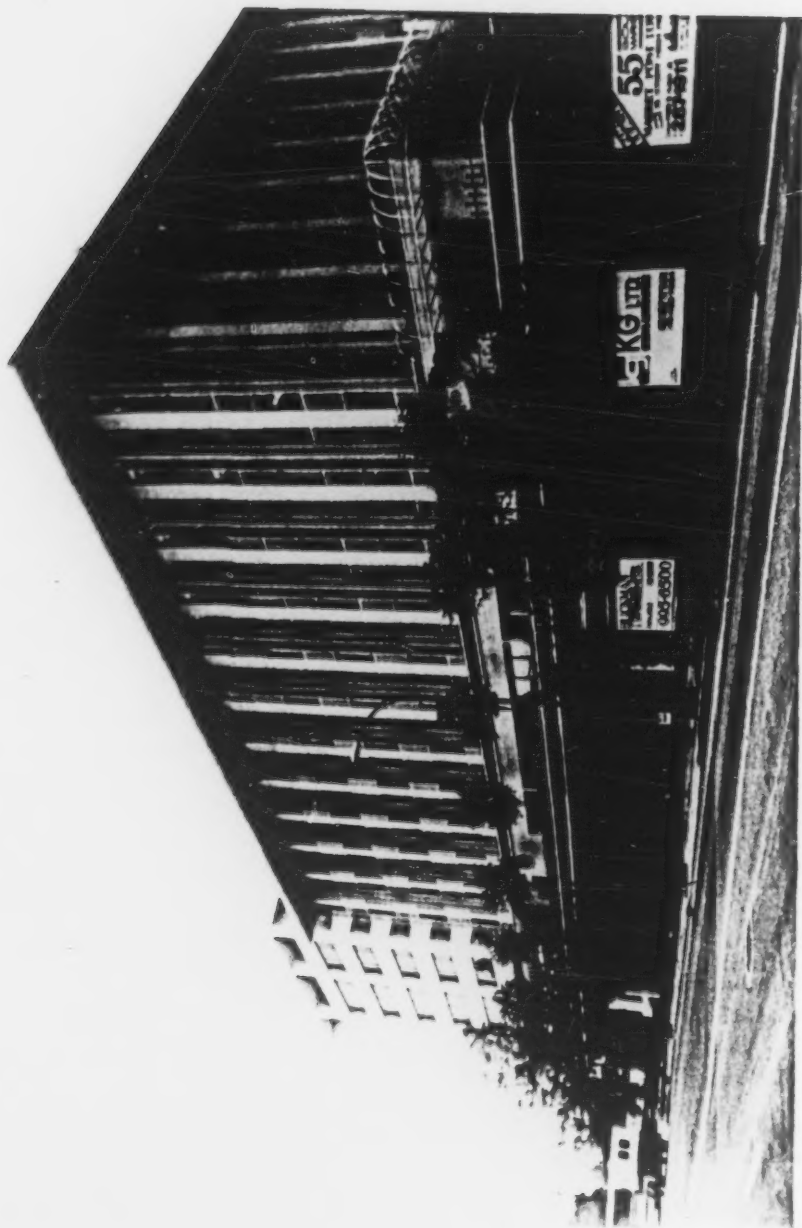


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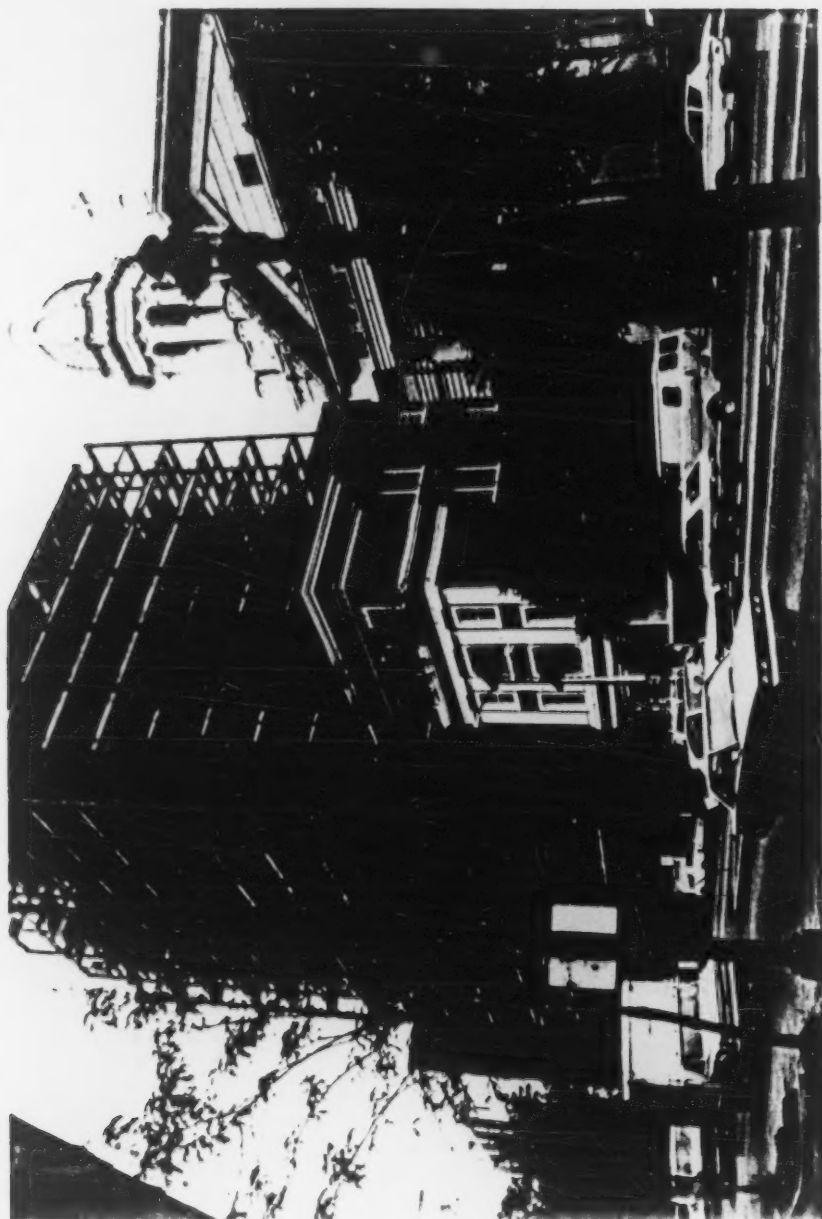


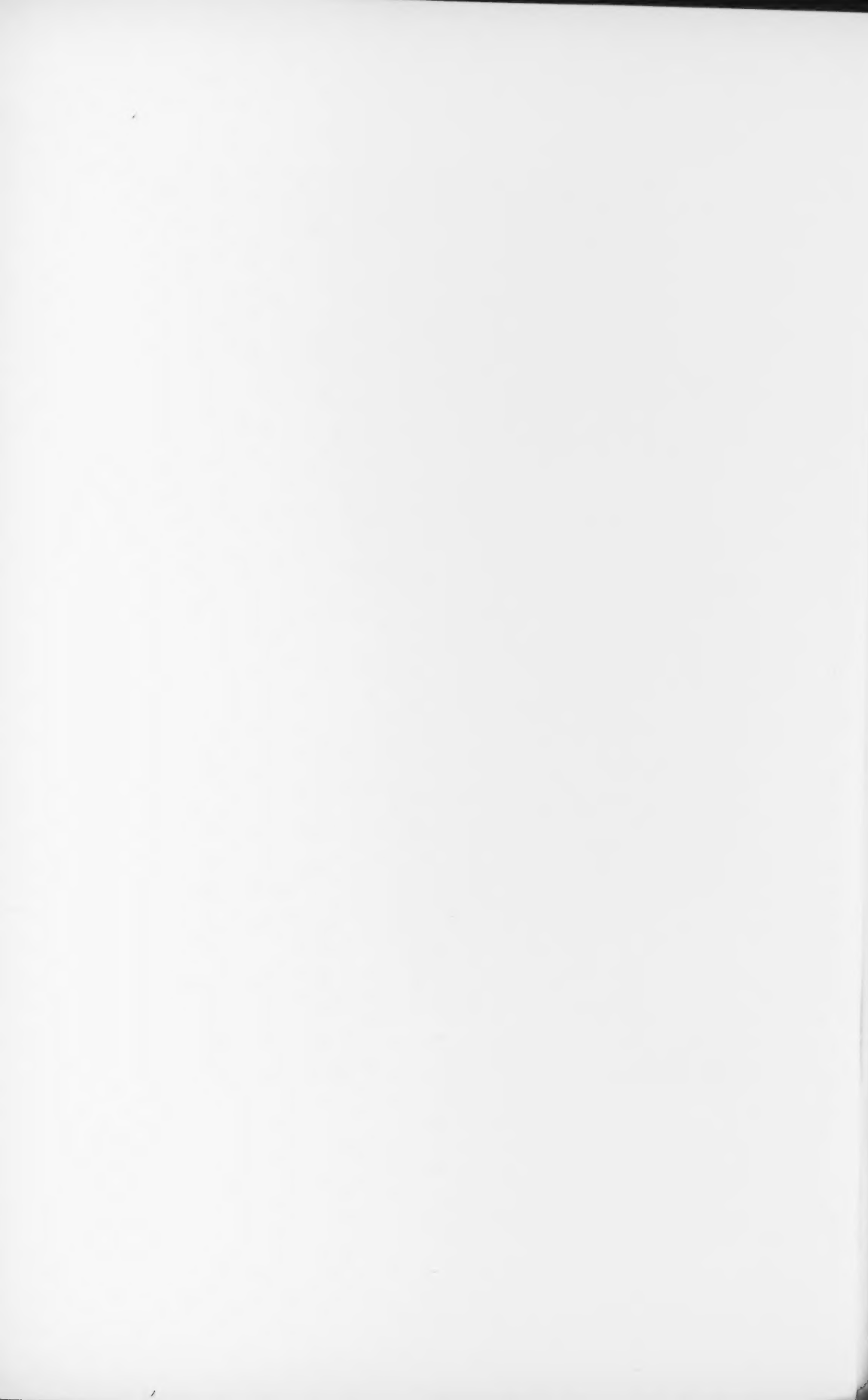
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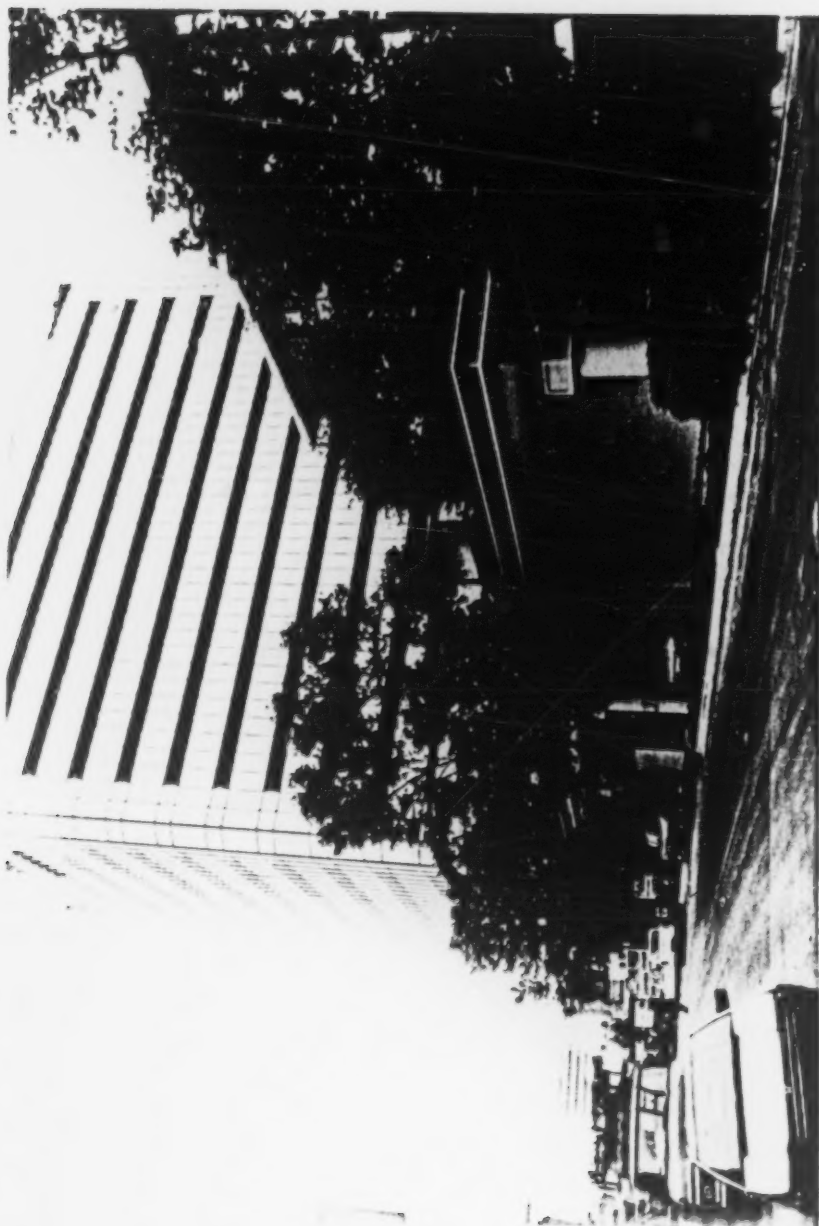




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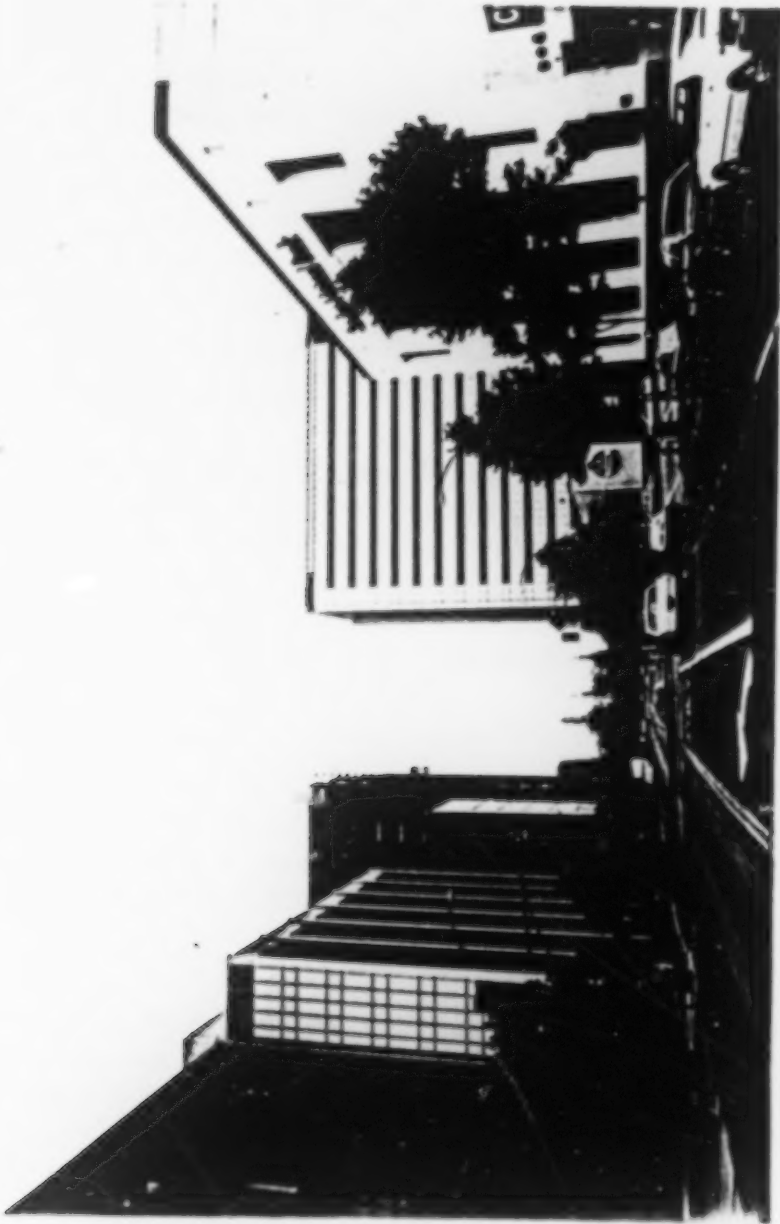




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A-86



Appendix E

Herbert F. Kaiser, Esq.
The Alcoa Building, Suite 1250
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 392-2255
Attorney for Plaintiffs

United States District Court
Northern District of California
CASE NO. C-84-20772 WAI

David A. Boone and Stephen P. Fox, individually and as
general partners of DSC-3 Group, a California Limited
Partnership, as general partners of Market/Post, Ltd., a
California Limited Partnership; Dave Goglio and Donald
Goglio, individually and as general partners of Three G's a
California Limited Partnership,
Plaintiffs,

vs.

Redevelopment Agency of the City of San Jose, a Public Body
Corporate and Politic of the State of California; City of San
Jose, a municipal corporation and subdivision of the State of
California; Frank Taylor; the Koll Company, a California
Corporation,
Defendants.

Plaintiffs' Reply to Defendants City of San Jose and Redevel-
opment Agency of the City of San Jose's Response to Court's
Order to Show Cause Concerning Retention of Jurisdiction

[Filed March 12, 1986]

Date: March 26, 1986

Time: 9:00 a.m.

Dept.: Honorable William A. Ingram

[001356]

Herbert F. Kaiser, Esq.
The Alcoa Building, Suite 1250
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 392-2255
Attorney for Plaintiffs

Superior Court of California

County of Santa Clara

Case No. 594949

David A. Boone and Stephen P. Fox, individually and as
general partners of DSC-3 Group, a California Limited
Partnership, as general partners of Market/Post, Ltd., a
California Limited Partnership; Dave Goglio and Donald
Goglio, individually and as general partners of Three G's a
California Limited Partnership,
Plaintiffs,

vs.

Redevelopment Agency of the City of San Jose, a Public Body
Corporate and Politic of the State of California; City of San
Jose, a municipal corporation and subdivision of the State of
California; Frank Taylor; Harry Mavrogenes; Dennis Korabiak;
and Does I through XX, inclusive,
Defendants.

First Amended Complaint For Damages: Equitable Estoppel;
Inverse Condemnation; Declaratory Relief

[Filed March 11, 1986]

Plaintiffs allege:

First Cause of Action
(Equitable Estoppel)

1. Plaintiffs David A. Boone ("Boone") and Stephen P. Fox
("Fox") are individual citizens of the State of California, and are
general partners in DSC-3 Group, a California Limited Partner-
ship, and Market/Post, Ltd., a California Limited Partnership.
Plaintiffs David Goglio and Donald Goglio (hereinafter collec-
tively called "Goglio") are individual citizens of the State of

California, and are general partners in 3-G's, a California Limited Partnership. All individual plaintiffs reside in the County of Santa Clara and the limited partnership entities are duly licensed to transact business in the State of California with their principal place of business in Santa Clara County.

2. Defendant Redevelopment Agency of The City of San Jose ("Agency") is a public agency organized and existing under a resolution of the City Council of San Jose.

3. Defendant City of San Jose ("City") is a municipal corporation, and a subdivision of the State of California.

4. Defendant Frank Taylor ("Taylor") was at relevant times Executive Director of defendant Redevelopment Agency of the City of San Jose. Defendant Harry Mavrogenes ("Mavrogenes") was at all times relevant Downtown Coordinator for defendant City of San Jose and its Redevelopment Agency. Defendant Dennis Korabiak ("Korabiak") was at all times relevant Parking Contract Coordinator for defendant City of San Jose and its Redevelopment Agency.

5. Plaintiffs are ignorant of the true names and capacities of defendants sued herein as Does I through XX, inclusive, and therefore sue those defendants by such fictitious names. Plaintiffs will amend this complaint to allege the true names and capacities when ascertained. Plaintiffs are informed and believe and thereon alleges that each of said fictitiously named defendants is responsible in some manner for the occurrences herein alleged.

6. Defendants have acted as agents of one another and plaintiffs are informed and believe and thereon allege that at all times herein mentioned each of the defendants sued herein as Does I through XX, inclusive, was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment.

7. On July 8, 1975, the City Council of San Jose, acting as defendant Redevelopment Agency, approved the Pueblo Uno Redevelopment Plan by City Ordinance No. 17778 and Agency Resolution No. 1714, hereinafter referred to as "the Plan" (a copy of which is attached hereto and marked Exhibit A). The

concept and objective of "the plan," was to redevelop the Pueblo Uno Project Area of downtown San Jose, by private enterprise alone, in order to promote growth and fair economic competition by attracting private investment without public assistance or condemnation proceedings. Defendant City and Agency provided in the plan that in order to accomplish these goals, and as an incentive for private development defendant City would provide the necessary infrastructure such as "parking and traffic facilities essential to the operation of the businesses" in the area. Financing for the infrastructure and parking facilities would be provided from tax increment and assessment districts initiated and created by the city to collect revenues from property owners within the project area or from other areas as needed. City was to provide parking facilities within the project area and use these parking revenues collected from tenants and visitors of building in the project area to provide additional parking facilities for the project area.

8. As a result of the enactment of "the Plan" with above-described inducements, defendants attracted over \$50 million in private investment from 1975 through 1982 which, by the end of 1982, had developed approximately 327,000 sq. ft. of office space in the area. Thus, private enterprise has eliminated blight without the expenditure of any City or Agency funds except for street and landscape improvements. By 1982 property values in the project area were increased raising additional tax revenues and the project area was "experiencing a great deal of development interest and activity" and private development of the project area was "expected to contribute significantly to the future construction activity" in downtown San Jose and yield substantial benefits to the public at large.

9. From April 1982 through June 1, 1983, defendants City and Agency, using the said "plan" through defendant Harry Mavrogenes, induced plaintiffs to invest \$56 million in developing and building the largest office building in San Jose in the project area. The "Downtown" San Jose 1995 Final Environmental Impact Report adopted according to California Environmental Quality Act guidelines in April 1983 provided for a City parking

facility in the project area for the developers of office buildings and retail stores pursuant to "the plan."

10. Defendants, and each of them, knew that plaintiffs would rely upon the abovementioned "Plan" and policies in building their office building, and plaintiffs, in fact, did so.

11. On June 1, 1983, the Planning Commission and Building Department of the City of San Jose issued to plaintiffs a building permit which had been approved by defendants City Council and Agency after their full review and approval of the parking provisions negotiated by defendants Mavrogenes and Korabiak providing plaintiffs two parking spaces for every thousand square feet of rentable office space, 300 parking spaces in City owned parking facilities and 300 spaces provided by plaintiffs in their building.

12. From June 1, 1983, through November 19, 1984, defendants Harry Mavrogenes, Dennis Korabiak and Frank Taylor continued to represent to plaintiffs that defendant City and Agency would honor "the plan" and provide essential parking facilities provided for in the building permit approval process, as stated above, and plaintiffs continued to believe those representations, and invested \$56 million, built their building in reliance thereon and have therefore perfected their rights according to "the plan" and building permit approval as stated above.

13. On December 6, 1983, the City Council acting as the Agency adopted its Fourth Amended Pueblo Uno Redevelopment Plan Ordinance No. 215210, Agency Resolution No. 2316, which provided in part, for "adequate land for parking" to developers in the project area as stated above (a copy of said amended plan is attached and marked Exhibit B.)

14. On March 21, 1984, the City Council passed the "Downtown Parking Management Ordinance" which provided, in part, for joint venture development by defendant City and private developers of parking facilities essential to the operation of developers' businesses. (A copy of a letter received from the city regarding Joint Venture of the parking facilities is attached hereto and marked Exhibit C.) At that time defendants Mavrogenes, Korabiak and Taylor represented to plaintiffs that the "Downtown Parking Management Ordinance" again supported and accom-

plished the intent of "the Plan" to provide adequate land for parking and parking facilities which were essential to the operation of plaintiffs' business.

15. On November 19, 1984, defendant City, through defendants Harry Mavrogenes and Dennis Korabiak, and defendant Agency, through defendant Frank Taylor, refused to provide the essential parking facilities and/or adequate land for parking, and for which they had provided for in the building permit approval process.

16. Plaintiffs are informed and believe and therefor alleged that defendants, and each of them, never intended to provide plaintiffs with parking facilities essential to the operation of their business or adequate land for parking as stated in the building permit review process and continued to deceive plaintiffs into believing they would. Plaintiffs had no knowledge of defendants' deception nor did they have the means of acquiring such knowledge.

17. As a result of defendants' above-described conduct, plaintiffs have been and are continuing to be injured by the diminution of value of their property, lost income, lost profits, and lost investment expectations in an amount which is not now certain, and plaintiff will ask leave of this court to amend this complaint to set forth those amounts when they have been ascertained.

18. Defendant City and Agency's failure to provide the parking facilities which are essential to the operation of plaintiffs' office building and/or adequate land for parking, as approved in the building permit approval process, will injure rather than benefit the public and will defeat no public policy. An order of this court requiring defendants City and Agency either to provide essential parking according to "the Plan" and building permit approval process and the intent of the Parking Management Ordinance, as stated above, or to pay such damages to plaintiffs as will permit them to provide such parking.

19. Plaintiffs have prosecuted this claim, as well as that for inverse condemnation which is contained in plaintiffs' third cause of action below, as pendent claims in the United States District Court for the Northern District of California in Case No. C-84-

20772-WAI. That case originally was filed on December 12, 1984. That court dismissed the federal claims in that action on January 24, 1986, and has provided for dismissal of these pendent claims "without prejudice" to their reassertion in state court in said order. Plaintiffs previously had presented these pendent claims to the City of San Jose on March 12, 1985, and defendant City had denied them on April 29, 1985.

WHEREFORE plaintiffs pray judgment as hereinafter set forth.

SECOND CAUSE OF ACTION (DECLARATORY RELIEF)

20. Plaintiffs incorporate herein by reference the allegations made in paragraphs 1-19, of their first and second causes of action as though fully set forth again.

21. An actual and justiciable controversy exists between plaintiffs and defendants, and each of them, in that plaintiffs allege:

(a) Defendants, and each of them, have illegally implemented the Fourth Amended Pueblo Uno Redevelopment Plan, adopted December 6, 1983, by City Council Ordinance No. 215210 and Agency Resolution No. 2316, and the City and Agency Ordinance and Resolution No. 57333 adopted on March 29, 1984, by not complying and actually violating the California Community Redevelopment Law and the California Environmental Quality Act because: (1) they approved the expenditure of public funds for improvements in the Pueblo Uno Project Area which could reasonably and was actually being accomplished by private enterprise acting alone; (2) the challenged ordinances and resolutions were adopted without an environmental or supplemental impact report; (3) without notice to the property owners and businesses in the subject area of the Environmental and Traffic Review process; (4) and provided for the sale of property of the Agency acquired with taxing increment monies at less than fair market reuse value. The said conduct was in violation of Sections 33352, 33433, 56035 and 56040 of the Health and Safety Code of said California Community Redevelopment Law and in violation of

Sections 21000 *et seq.*, 21166 of the Public Resources Code of the California Environmental Quality Act.

(b) Plaintiffs did not discover the said illegal implementation of the plan until after November 19, 1985, because of the deception of defendants, therefore, by the Doctrine of Equitable Tolling these challenges are not time barred.

(c) Plaintiffs request that the court take judicial notice pursuant to section 452 of the Evidence Code of Superior Court Action, Case No. 553522, *Redevelopment Agency of the San Jose, et al. v. Alfonso DeTagle, et al.*, and Superior Court Action, Case No. 553519, *Redevelopment Agency of the San Jose, et al. v. Beverly Gable, et al.*, challenging the illegal implementation of the said ordinances and resolutions essentially on the same grounds including claims that said ordinances and resolutions were illegally implemented and/or failed to comply with California Civil Code of Procedure Sections 1245.210, 1245.255, 1245.270, 1245.310, 1245.390, as stated in the affirmative defenses in said action filed on September 27, 1984.

(d) Defendants, and each of them, dispute the allegations as stated in subparagraphs a) through c) above, *supra*.

22. Plaintiffs therefore request a declaration by this court that the defendants, and each of them, should comply with the said provisions of the California Redevelopment Law, California Environmental Quality Act and California Civil Code of Procedure as stated above in Paragraph 21a) and/or the ordinances and resolutions be set aside and declared invalid and illegal and without any force and effect.

23. Private enforcement is necessary since the above violations will not be corrected otherwise. Plaintiffs are therefore entitled to reasonable attorney's fees for the prosecution of these claims pursuant to California Code of Civil Procedures Section 1021.5.

WHEREFORE plaintiffs pray judgment as hereinafter set forth.

THIRD CAUSE OF ACTION
(INVERSE CONDEMNATION)

24. Plaintiffs, by reference, hereby incorporate the allegations of paragraphs 1-19 of their first cause of action as though fully set forth again.

25. This cause of action is filed pursuant to Cal. Constitution Article I, Section 19.

26. At all times mentioned herein plaintiffs were the owners of three parcels of real property and developed a 315,000 square feet, 15 story office building, on said real property located at 55 South Market Street pursuant to the Pueblo Uno Redevelopment Plan adopted by the City of San Jose, the building permit issued by the City of San Jose on June 1, 1983 and therefore have perfected their rights as claimed herein.

27. Defendants, and each of them, have violated City Ordinance No. 17778 and Agency Resolution No. 1714 "the Plan, City Ordinance No. 215210 and Agency Resolution No. 2316 and the parking provisions of the building permit approved by defendant City and Agency on June 1, 1983, by not providing plaintiffs essential parking facilities and/or adequate land for parking as so provided for in "the plan" and building permit as stated in paragraphs 7 and 11 above. Defendants, and each of them, have failed and refused to comply with the "Downtown San Jose 1995 Final Environmental Impact Report" adopted April 1983, as stated in paragraph 9, regarding public parking facilities in the project area, and have failed to prepare a new or supplemental environmental report as required by the California Environmental Quality Act Public Resource Code Section 21000 *et seq.*

28. By reason of said acts and conduct defendants, and each of them, as herein alleged in Paragraphs 1-19, plaintiffs have therefor been damaged by the diminution of value of their property, lost income, lost profits, lost investment expectations, and loss of good will, in a sum which is unascertainable at the present time. Plaintiffs pray leave of court to amend this complaint when said sum is ascertained.

29. Plaintiffs have received no compensation for the damage to their properties.

30. Plaintiffs have incurred and will incur attorney's appraisal and engineering fees because of these proceedings in amounts which cannot as yet be ascertained, which are recoverable in this action under the provisions of Section 1036 of the Code of Civil Procedure.

WHEREFORE Plaintiffs pray judgment against defendants, and each of them, as follows:

1. Defendants be ordered to provide the legislatively promised parking as stated in Plaintiffs' First Cause of Action, paragraphs 7 and 11, and/or;

2. That plaintiffs be awarded their actual, compensatory damages according to proof;

3. That plaintiffs be awarded reasonable attorney's fees and costs of litigation under the California Code of Civil Procedure Section 1021.5

4. That defendants be ordered to comply with the Sections of the California Community Redevelopment Law, Environmental Quality Act and Code of Civil Procedure as so stated in paragraph 20, subparagraphs a) through c), and/or that the court declare that said challenged ordinances as stated in the second cause of action be declared invalid and illegal and without full force and effect.

5. For damages according to proof in the inverse condemnation cause of action;

6. For reasonable attorney's fees, appraisal and engineering fees according to proof as prayed for in the inverse condemnation cause of action;

7. For loss of income;

8. For loss of profits;

9. For loss of good will;

10. For pre-condemnation damages;

11. For interest, costs and fees as provided by law and as the court may deem just and equitable;

12. For such other and further relief as the court deems proper.

Executed this 11th day of March, 1986

/s/ HERBERT F. KAISER
Herbert F. Kaiser
Attorney for Plaintiffs

Exhibit A

CITY COUNCIL

Janet Gray Hayes, Mayor
Roy Naylor, Vice Mayor

Joseph A. Colla	Jim Self
Alfredo Garza	Susanne Wilson
Larry Pegram	

PLANNING COMMISSION

Mike Honda, Chairman
John Ulrich, Vice Chairman

Wilfred E. Blessing	Pat Shelton
Daniel J. Caputo	William Bell
Margaret J. Murphy	Valerie Watt (ex-officio)

3. Parking

Private parking shall be permitted in conjunction with retail or office developments. Interim surface parking is permitted in phased developments, ultimately to be replaced by retail or office uses at the first floor level. Parking shall serve the short-term demand generated by the permitted land uses. The long-range objective is to eliminate curb and surface parking in the core area. However, phased development must consider the needs of existing business. There is no intent in this plan to reduce the parking and traffic facilities essential to the operation of present business.

The intent of the Core Area Plan is to develop off-street parking for short-term commercial uses and residential uses conveniently located at the generators of activity. Long-term

parking for such commercial uses is intended to be provided around the periphery of the project with a traffic distribution network established to connect those areas with the core. The City is now discussing with the County Transit District ways and means of developing a shuttle system connecting off-street parking, peripheral parking and activity centers within the core area.

PROJECT PROPOSALS

301 Owner Participation and Rehabilitation

A. This Redevelopment Plan identifies general planning and design objectives which will enhance and strengthen the renewal area and encourage the physical rehabilitation of buildings in the area. The goal of property rehabilitation is to provide a safe, sanitary, functional, and attractive environment. Fundamental to this goal is the rehabilitation of all existing commercial buildings to a safe and sound condition—to a condition meeting minimum present-day standards for health, safety, sanitation, and welfare, and to a condition sufficient to provide reasonable protection against the reoccurrence of blighting conditions. Redevelopment Agency participation will include the provision of technical assistance to property owners to facilitate and stimulate achievement of rehabilitation standards and objectives.

B. An owner or owners of property in the Project Area may participate in the redevelopment of property in the Project Area in accordance with rules adopted by the Agency as they may be amended from time to time and on file in the offices of said Agency. Property owners may participate subject to the submission of proof to the Agency of their qualifications, financial responsibility, and execution of an Owner Participation Agreement.

It has been pointed out that the portion of the Pueblo Uno Project (east of Market Street) is conceived largely as a rehabilitation project. It is the intent of the Redevelopment Plan to retain the present land intensity and diversity of architectural styles, in the Project Area, whenever feasible and in conformance with the Core Area Plan. Cooperative public and private actions will be

undertaken for the preservation of structures which are determined to be of bonafide historical and/or architectural merit.

Because this project does not rely on condemnation proceedings to achieve its objective, the project must rest on the cooperative spirit of the City, the Redevelopment Agency, property owners and tenants of the Project Area to achieve success. The City of San Jose and the Redevelopment Agency will encourage viable rehabilitation programs but private cooperation will be required to implement the rehabilitation programs.

In the event an owner is unable to cooperate in the redevelopment or rehabilitation of his property and with the consent of the owner the Agency *may*, if funding sources are available, acquire (by purchase, lease, grant, bequest, or otherwise) all or a sufficient interest in the property in order to carry out the objectives of the Plan.

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Exhibit B

PUEBLO UNO REDEVELOPMENT PLAN

Prepared by

The Redevelopment Agency
of the City of San Jose

Adopted by

The City Council on
December 6, 1983
Ordinance No. 215210

* * *

F. The provision of adequate land for parking and open spaces.

* * *

EXHIBIT C

City of San Jose—Memorandum

To See distribution below

Subject Downtown Parking Management Ordinance

From Dennis Korabiak, Parking Contract Coordinator

Date March 21, 1984

On March 21, 1984 the City Council approved amendments to the zoning code regulating parking requirements in the downtown. These amendments eliminated the "no parking required" provisions in the downtown parking district and reduced the City-wide requirements in the downtown outside the parking district. The Ordinance also clarifies certain code sections related to City-wide parking requirements. Listed below is a brief summary of these new requirements:

* * * *

Developers can meet the required parking utilizing three methods, either individually or in combination with one another. They are:

(a) Provide all parking on site.

(b) Provide parking off site within a reasonably walking distance under a joint venture agreement with another developer or under a joint venture agreement with the City of San Jose.

* * * *

Attached is a copy of the Ordinance and a map identifying the Ordinance boundaries. The Ordinance becomes effective April 5, 1984. If you should have any questions, please feel free to contact me at X5548.

/s/ DENNIS KORBIAK

Dennis Korbiak

Parking Contract Coordinator

Distribution

Frank Taylor

Les White

William L. Phillips

Gary J. Schoennauer

Kent South

Frank Brown

Kent Edens

Brad Pearson

Joe Perez

OCCD Staff

Redevelopment Staff

Appendix F

Herbert F. Kaiser, Esq.
The Alcoa Building, Suite 1250
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 392-1184
Attorney for Plaintiffs-Appellants
David A. Boone, Stephen P. Fox and DSB-2 Investments

United States Court of Appeals
For The Ninth Circuit

No. 86-2506

DC# CU-84-20772 WAI Northern California
San Jose

David A. Boone and Stephen P. Fox, individually and as
general partners of DSB-3 Group, et al.
Plaintiffs-Appellants,

vs.

Redevelopment Agency of the City of San Jose, et al.,
Defendants-Appellees.

Appellants' Request To Take Judicial Notice

Please take notice that pursuant to Rule 201, Federal Rules of Evidence, Appellants hereby request that the Court take Judicial Notice of the following Public Documents, Records of Legislative Proceedings and Public Notices:

EXHIBIT A: Assembly Committee on Revenue and Taxation Report Analysis of AB 203.

EXHIBIT B: Redevelopment Policy Statement—Third Draft by League of California Cities' Redevelopment Task Force.

EXHIBIT C: Public Notice to Property Owner, Tenant and Businessperson of hearing to Consider Amendments To the Pueblo Uno Redevelopment Plan of December 6, 1983.

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With respect to the above, Appellants attach hereto what the undersigned counsel certifies to be true and correct copies.

Dated: January 5, 1986

/s/ HERBERT F. KAISER

Herbert F. Kaiser
Attorney for Plaintiffs-
Appellants

Exhibit A

Assembly Committee on Revenue and Taxation

Thomas M. Hannigan, Chairman

AB 203 (Hannigan)

January 9, 1984

AB 203 (Hannigan), As Amended January 3, 1984

Subject: Revises Redevelopment Law

Consultant: Linda Wilson

Fiscal Effect: (Fiscal Committee: Yes)

State: Potential minor revenue gain due to school districts receiving normal 2% annual property tax increase in redevelopment project areas.

Other possible revenue gains due to potential decrease in number of redevelopment projects. (State reimbursements to school districts would decrease.)

Local: Potential minor costs to counties to comply with additional reporting requirements.

Digest (What the Bill Does):

Under current law, the legislative body of a local government may authorize the redevelopment agency of that government to select blighted areas of the community for redevelopment. (Most often, it is the legislative body, e.g., city council, which also sits as the redevelopment agency board). Blighted areas include property suffering from economic dislocation or disuse due to specified reasons such as faulty planning, inadequate public improvements and facilities, a prevalence of depreciated values, impaired investments, and social and economic maladjustment, and others.

When the redevelopment agency is formed, it "freezes" the property tax base in the area. Any increase in tax revenues (the tax increment) due to increased property values or inflation is used to plan, develop, clear, reconstruct or rehabilitate the area. Taxing entities (counties, school districts, special districts, etc.) continue to receive revenue from the "base" amount of assessed value as they did prior to the agency being formed, but do not

receive any of the growth in revenue, since tax increment is earmarked for redevelopment. However, the "pass-throughs" of some of the tax increment may be made if the entities involved agree.

The tax increment is available to the redevelopment agency in annual installments, but the agency may sell tax allocation bonds, pledging the annual increment to retire the bonds. A specified amount of the tax increment must be used for housing unless certain findings are made.

A redevelopment agency using tax increment financing must specify a limit on the amount of taxes to be diverted to the agency. An Extension of the time may be made by amending the plan. When the plan is complete and loans are repaid, the tax revenue increments which have been diverted to the agency and new revenues generated by improvements are directed to the taxing entities in the normal manner.

Other features of current redevelopment law relative to this bill are as follows:

- Land and buildings which are not deteriorated may be included in the project area but the law states that they be an integral part of the project and not be included for the purpose of obtaining a tax increment advantage without "substantial justification". Such justification consists of a finding by the agency.
- The agency may make payments to any taxing agency (other than the one adopting the project) of an amount of money necessary to alleviate any financial hardship brought about by the project.
- Prior to approval of a redevelopment plan calling for tax increment financing, the plan may be submitted to a fiscal review committee at the request of any affected taxing agency. The committee is composed of one representative from each affected taxing entity.

The purpose of the committee is to provide a formal means for local taxing agencies to advise the redevelopment agency of the

impacts of the plan on their jurisdictions and suggest amendments to the plan.

- The agency must notify county officials of the last equalized assessment roll which will be used to determine the allocation of taxes to all taxing entities from property in the project area.
- County officials must then prepare and deliver a report including specific information about the division of taxes to the agency and each taxing entity.
- The agency submits the report to the legislative body (e.g. city council) with the redevelopment plan. The agency must consult with each taxing entity receiving property taxes from the project area prior to notice of the public hearing at which the legislative body may approve the plan.

This bill is similar to AB 1545 (Hannigan) of 1983, vetoed by the Governor. According to the author, the Governor did not oppose the redevelopment portions of the bill, now included in this bill. Apparently, the veto was due to the economic development district authority in AB 1545. Such authority is *not* included in this bill. Otherwise, the bill is substantially in the same form as it passed the Legislature last year.

This bill would revise law related to redevelopment as follows:

1. Changes the Redevelopment Plan Adoption Process

The county would be required to prepare the assessed valuation report for the redevelopment agency and affected taxing entities within 60 days instead of 90 days under most circumstances.

The redevelopment agency would be required to provide more specific information earlier about the project. Specifically, it would be required to 1) send a copy of a draft environmental impact report to each affected taxing entity and to the fiscal review committee; 2) send to each affected taxing entity a preliminary report containing the reasons for the selection of the project area, a description of the physical, social and economic conditions in the area; and the proposed method of financing the

redevelopment; and 3) consult with the fiscal review committee, within 15 days of creation of the committee, to identify fiscal effects of the proposed plan and possible provisions to eliminate those effects.

The chairman of the fiscal review committee would be required to set a hearing between 15 and 30 days of transmission of the plan. The hearing could last up to 15 days. (Current law specifies 30 and 54 days.)

The fiscal review committee would be required to report to the redevelopment agency within 30 days of the hearing on the fiscal impact of the plan including any financial burden, as defined, to a taxing entity. (Current law specifies no such deadline for this requirement.)

If the fiscal review committee determines that the plan would cause a financial burden, such determination would be required to be supported by evidence and could include recommendations to eliminate the burden. Recommendations could include proposed amendments to the plan or proposed amounts of tax increment financing to be paid by the agency to affected taxing entities. (Current law is not specific regarding the contents of the fiscal review committee analysis.)

The redevelopment agency would be required to document with evidence of financial burden any payments to taxing entities.

Any time a redevelopment agency proposes amendments to a redevelopment plan which lengthen the life of the redevelopment plan or increase the dollars allocated to the redevelopment agency, the agency would be required to follow the same process that applies to new plan adoption.

2. Financial Burden Defined

The bill adds to redevelopment law a definition of "financial burden or detriment". The term is defined as 1) an increase in the quality or quantity of service provided by the affected taxing entity caused by the redevelopment project or 2) a loss of property tax revenues by an affected taxing entity produced by change of ownership or new construction which would have been received by the taxing entity if the redevelopment project had not

been established. The definition specifies that the normal allocation of tax increment to the redevelopment area does not constitute financial burden. This section would sunset after two years.

3. Blight Redefined

The bill revises the definition of blight to restrict its applicability as follows:

a. to emphasize that blighted areas must constitute a serious physical, social, or economic burden on the community which cannot be alleviated by private enterprise acting alone,

b. to eliminate as factors in determining blight:

(1) economic dislocation, deterioration, or disuse resulting from faulty planning,

(2) areas submerged by water.

4. Receipt of 2% Increase

The bill specifies that prior to adoption of the plan, every affected taxing entity may elect, and every school and community college district shall elect, to receive the increase in assessed value (up to 2%) which would have occurred regardless of the redevelopment project.

5. Vacant Land Excluded

The definition of "project area" in current law limits the amount of vacant land which can be included. This provision was enacted in AB 322, Chapter 1324 of 1983. This bill clarifies that provision by specifying that an amendment to a redevelopment area must also meet the criteria for a project area.

6. Use of Redevelopment Funds

The bill specifies that a redevelopment agency may not pay for normal maintenance or operations of community facilities or public improvements (e.g., city hall, roads) with its tax increment financing.

7. Effective Date

The author intends to amend an urgency clause into the bill.

STAFF COMMENTARY:

1. Purpose of the Bill

The purpose of this bill is to eliminate abuses of the redevelopment process by:

a. Improving the existing plan adoption process so that taxing agencies receive more specific information earlier, allowing them to better assess the fiscal impact of proposed projects;

b. Protecting taxing agencies by requiring redevelopment agencies to go through the normal plan adoption process when an amendment to a redevelopment plan is proposed;

c. Strengthening and reforming the fiscal review process by giving more specificity and direction with regard to the role and purpose of the fiscal review committee;

d. Protecting the state by reducing the ability of redevelopment agencies and counties to enter into agreements which result in the school districts, and therefore the state, paying for an inappropriate share of redevelopment projects by 1) narrowly defining the term "financial burden or detriment"; and 2) requiring all agreements between agencies to be based on findings and evidence of the financial burden or detriment;

e. Enabling all taxing agencies to obtain the 2% of the base year roll and further protect the state by mandating receipt of this 2% by school districts;

f. Defining the term "maintenance" to respond to the concerns of some counties that tax increment monies are used for normal maintenance of city improvements.

2. Non-Blighted Areas Included in Redevelopment Areas

Counties argue that many redevelopment project areas include much unblighted land. Thus, they say, such projects are really *development* projects. Cities often admit that redevelopment is one of the few remaining tools to finance growth.

The bill redefines blight to be more restrictive. Areas now called "blighted" solely because of flooding or non-specific faulty planning would not longer fit the criteria of blight under this bill.

3. Redevelopment Agency Imposes Financial Burden and "Owns" the Growth

Counties argue that cities (normally the local government body that establishes redevelopment agencies) have the unilateral power to impose tax increment financing upon other taxing agencies. The capturing of the tax increment by the agency causes a loss of revenue to the other taxing agencies.

They reason that much of the "redevelopment" attributed to formation of the agency is really "development" which might well have occurred without the project and the concomitant loss of revenue to other taxing entities.

This bill would not give counties or other agencies veto power over formation of a redevelopment agency, but would allow each affected agency (and mandate each school district) to receive the normal 2% revenue growth. Thus, assuming the growth would not have occurred, no taxing entity loses.

The bill would prevent sharing of the tax increment, beyond the 2% unless financial burden or detriment can be proven. Some counties would prefer to continue the practice of sharing revenues in any manner agreed upon, arguing that the definition proposed by this bill will be difficult to meet.

However, proponents of the bill argue that if more revenue is shared, the life-span of the project must be increased to accomplish the purpose of the plan. Further, they believe that the sharing of the 2% increase, combined with the new definition of financial burden and the requirement that agreements be based on more specific findings and evidence will help ensure that other taxing entities are not adversely affected to the degree they are currently.

The definition would sunset after two years. According to the author, this will allow the Legislature the opportunity to reevaluate the definition after a trial period.

4. State Is Loser Under Current Agreement System

One of the major problems with the redevelopment process has been that counties, or other affected taxing entities, threaten to take the redevelopment agency to court to settle disputes, thus lengthening the process, unless a satisfactory "pass-through" agreement can be reached. To avoid this, agreements with opposing agencies are readily made. School districts have no incentive to make such agreements, since state school apportionment formulas keep districts "whole" regardless of any loss of property tax revenue in the district. Thus, indirectly, the state can be the major funding source of redevelopment projects.

Litigation on controversial projects could increase under this bill because "pass-through" agreements would be more restricted. But the state would bear proportionately a lesser burden of funding the project.

5. Agency Formation Process Can Be Stalled to Detriment of Agency and Counties

The bill attempts to halt fiscal review committees from slowing the agency formation process. This is accomplished through the more specific deadlines.

6. Additional Administrative Burden

AB 203 would require an agency to send taxing entities and members of the fiscal review committee a copy of the draft environmental impact report, and for taxing entities a preliminary report that would include an assessment of the "economic" feasibility of the proposed projects. It is likely that these requirements will add to the difficulty, time and cost involved in adopting redevelopment plans and amendments. Cities and counties agree the cost and burden would not be significant.

Exhibit B

REDEVELOPMENT POLICY STATEMENT

Third Draft by League of California Cities'
Redevelopment Task Force

1. The League believes that the fundamental purpose of redevelopment of urban areas is conservation of urban areas and halting urban deterioration in a manner consistent with (1) providing an environment for the social, economic, and psychological growth and well-being of all citizens, (2) expanding employment opportunities for jobless, underemployed, and low-income persons, and (3) expanding the supply of low and moderate-income housing. The League further believes that redevelopment is a governmental action which should be guided by the objective of improving designated areas which, for various reasons, appear incapable of significantly improving themselves within a reasonable period of time without redevelopment assistance; and that this governmental action is necessary under certain conditions and should be authorized when these conditions are present.

Discussion:

This purpose is consistent with existing State policy expressed in Section 33071 of the Health and Safety Code, as follows:

"The Legislature further finds and declares that a fundamental purpose of redevelopment is to expand the supply of low and moderate-income housing, to expand employment opportunities for jobless, underemployed, and low-income persons, and to provide an environment for the social, economic, and psychological growth and well-being of all citizens."

Before a redevelopment plan is approved by a governing body for a designated area, at least one of the following conditions must exist which impede that area from sound, planned and economic development:

a. Building characteristics—deteriorating or deteriorated buildings and structures which are unfit or unsafe to occupy.

b. Social characteristics—declining population and reduction of proper utilization of the area causing unemployment, crime, health hazards and other social problems.

c. Economic characteristics—prevalence of depreciating values, declining assessed valuations, impaired investments, and socio-economic maladjustment.

d. Land Ownership Characteristics—stagnant or improperly utilized areas suffering from inadequate street layout or faulty lot layout, subdivision and sale of lots of irregular form and shape and inadequate size for proper usefulness and development.

e. Natural disasters—damage caused from natural disasters, including hurricanes, earthquakes, tidal waves, storms, floods, mudslides, fires, explosions and other catastrophies, which warrant major disaster assistance, beyond other available governmental assistance, to repair damages.

The League's belief concerning the application of redevelopment to designated urban areas is also basically consistent with State policy expressed in Sections 33031-33034 State Health and Safety Code. These sections determine the characteristics of "blight", a term which was felt inappropriate for use in State redevelopment law by the League Redevelopment Task Force. The Task Force felt that "blight" is a subjective term with a decidedly negative connection which is a barrier to community understanding of redevelopment.

2. The League believes that redevelopment, including replanning, redesign, clearance, rehabilitation, reconstruction, modernization, new development, or any combination of these, of all or part of a designated redevelopment area, and the development of such residential, commercial, industrial, public, or other structures and spaces as may be appropriate or necessary to carry out the fundamental purpose of redevelopment as described above, is essential to improve or prevent deterioration of urban areas which, following object reanalysis by the local agency and public discussion, are found to be incapable of significantly improving themselves.

Discussion:

The League's belief concerning the need for redevelopment is consistent with State policy as stated in Section 33037 of the Health and Safety Code. State policy for urban redevelopment includes the following provisions:

- a. All appropriate means should be used to improve deteriorating urban areas and provide for the well being of residents of such areas.
- b. Whenever private enterprise alone is incapable of revitalizing deteriorating urban areas, it is in the public interest for government to assist and participate through the use of eminent domain, advancing or expending public funds for these purposes and providing the means to accomplish revitalization of such areas.
- c. Governmental acceptance of funding the use of public funds and the purchase of private property, to improve deteriorating urban areas and provide continuing assistance needed to strengthen these areas are in the interest of the health and welfare of the people of California and of residents of communities where these areas exist.

The League's belief concerning the need for redevelopment encompasses the State legislative emphasis upon improving deteriorated areas. In addition, the League believed that redevelopment should strengthen the ability of government to *prevent* deterioration of urban areas.

3. The League redevelopment is part of the local planning process and should be utilized to support the local and regional community development process.

Discussion:

The State Planning Act has created an inflexible planning process for local governments, thereby encouraging limited use of redevelopment. At the same time, local government must manage increasingly complex forces affecting community development, including unemployment, crime, health and other primarily human resource problems; urban deterioration and sprawling

growth; financial instability; and environmental deterioration. State planning requirements and redevelopment should support local government efforts to respond to these challenges. General plans should be broadened to embrace planning for effective utilization of human, environmental and economic resources. Local plans should provide for the use of redevelopment in a manner which supports local human resource, environmental and economic development policy. The league believes that a local policy making and planning process, encompassing all community development concerns, should be encouraged. This community development process should reflect the size and nature of individual cities in terms of both operational form of the process and planning direction resulting from the process. The primary objectives of the community development process are (1) managing urban growth and change to provide for human needs and protect the environment, while ensuring economic well-being, and (2) conserving and improving present urban areas to minimize the loss of human, capital and environmental resources.

4. The league believes that planning for redevelopment should be coordinated with and supportive of local and regional human resource policy and plans.

Discussion:

Improving the physical conditions of declining urban areas does not automatically remove the causes of blight and decline. Underlying causes of urban decay must also be mitigated, particularly poverty and unemployment. Local efforts to improve such human resource problems must influence redevelopment decisions. Most of the redevelopment projects undertaken in California have emphasized job-creating economic development. A total of 71 redevelopment projects have produced more than 30 million square feet of leaseable commercial space, and 28 projects have constructed or rehabilitated over 13 million square feet of industrial space.* Inadequate housing is also a key human as well as environmental problem in deteriorating urban areas. About 28,000 housing units, the great majority of which were for other

than relocation purposes, were provided in 66 redevelopment projects.*

The League believes, as stated in its Action Plan for the Social Responsibilities of Cities, that cities should adopt and advocate human resource policy, and that cities should employ all available means of carrying out this policy. In addition, the League's recently adopted housing policy reaffirms the policy of the League that cities should be responsible for assisting in provision of housing for low and very low income people. Redevelopment has demonstrated success in helping provide for human needs. Redevelopment should therefore be coordinated with and consistent with local human resource policy and plans.

5. The League believes that planning for redevelopment should be coordinated with and supportive of local and regional economic policy and plans.

Discussion:

A serious result of urban decline is loss of tax base. Declining tax revenue has obvious effects on local ability to deliver expected services. The people most likely to suffer from reductions in education, police, fire, sanitation, and other local services supported by the property tax are the poor and members of minority groups. The problems of these groups are compounded by side-effects of a declining tax base, including departure of job providing businesses, reduction in quality and availability of professional services, increasing crime, health hazards and other problems. Successful redevelopment that strengthens the tax base will improve the local economy as well as opportunities and living conditions for underprivileged people.

The League believes, however, that government should use redevelopment as a stimulant to the local economy only when private market forces appear incapable of significantly improving declining areas within a reasonable time. Community development planning should identify the role of the private sector in supporting local economy policy and plans. Government action

* Statistics from *Redevelopment and Tax Increment Financing*, by Ralph Andersen and Associates, 1976.

using redevelopment authority should occur where the private sector will not or cannot further local goals.

The League recognizes that, because of the State tax system, local jurisdictions must compete for tax revenues, and that redevelopment may allow one jurisdiction to achieve a competitive advantage over other jurisdictions in the search for additional tax revenue. For this reason, the Redevelopment Task Force recommends that an in-depth study be undertaken to determine the fiscal affect of redevelopment and tax increment financing on areas in the proximity of redevelopment areas.

6. The League believes that planning for redevelopment should be coordinated with and supportive of local and regional environmental quality policy and plans.

Discussion:

Preservation of physical and natural resources to provide a healthy, desirable environment should be of primary concern in redevelopment planning. Local land use, transportation, public facilities, open space and urban growth policies and plans can be supported or jeopardized by redevelopment activities. Local environmental policy and plans are often inadvertently isolated from a supportive relationship with other community development activities by State and Federal Environmental laws. CEQA and NEPA, with overlapping requirements, cause local government to be more concerned with sorting out and complying with legislative mandates than with comprehensive community development planning. Environmental laws should be integrated and should encourage development of supportive relationships between environmental concerns and other community development activities. As stated in the League's Action Plan for the Environmental Quality and in the League's population growth policy, environmental quality can only be maintained if all levels of government cooperate in an environmental planning process. All levels of government should adopt environmental policy and plans. State and federal environmental laws should advocate such cooperation, the State should provide the framework for local environmental planning, and local government environmental plans should be the building blocks for the intergovernmental environmental plan-

ning process. Redevelopment should be utilized as one of several tools available to local government to implement environmental quality policy and plans.

7. The League believes that redevelopment should be coordinated with and supportive of housing conservation and neighborhood preservation policies and programs, as well as policies and plans for construction of new housing.

Discussion:

Redevelopment was originally influenced by the Federal objective of slum clearance. Actual utilization of Federal assistance and authority provided in State law is evolving toward a conservation emphasis where efforts are made to preserve housing, public facilities, other structures and whole neighborhoods. The Federal urban renewal program was combined with several other categorical programs into Title I of the 1974 Housing and Community Development Act. The Title I program provides flexible block grants for community development to units of local government. The primary purpose of Title I is the establishment and maintenance of viable urban communities which, as Congress recognized, requires actions by all levels of government to eliminate blight, conserve and renew older urban areas and improve the living environment of lower income families. Housing conservation and neighborhood preservation have become the program focus for many block grant recipients. Further, the League's recently adopted housing policy also encourages cities to adopt housing conservation and neighborhood improvement policy and implement related programs. At the State level, legislation creating the State Housing Finance Agency also authorizes funds for housing conservation purposes, as well as new construction. In addition, the Marks-Foran Residential Rehabilitation Act of 1973 authorizes all cities and counties to sell revenue bonds and bond anticipation notes to provide financing for residential rehabilitation loans, and the State Housing Finance Agency is authorized to insure Marks-Foran bonds. With increasing resources to carry out much needed housing and neighborhood revitalization, redevelopment as a public tool to help improve urban areas impeded from sound, planned and economic development is more important than ever.

8. The League believes that local legislative bodies should serve as the policy body for redevelopment agencies. There is no need for State statutory amendments mandating this, however.

Discussion:

Public accountability and planning coordination are important to successful and effective redevelopment. Accountability and coordination are improved when locally elected officials direct redevelopment agencies. The authority to have City Councils serve as the redevelopment policy board is provided in State law, though this designation is not mandated. Most California cities with active redevelopment agencies have city councils serve as the governing body of the redevelopment agency. Only 20 of the 152 city and county redevelopment agencies have separate policy boards, and of these 20 only 2 were created after 1970.* The trend is certainly to transfer governing authority for redevelopment to elected officials.

9. The League believes that tax increment financing authority must exist to support redevelopment.

Discussion:

Funding for redevelopment activities is hard to find. The League believes that redevelopment benefits all taxing agencies sharing property tax revenues, and that tax increment financing is a fair and practical means of sharing the cost of these benefits. The League further believes that tax increment financing is particularly justifiable as it must be used in conjunction with and under the authority of the California Community Redevelopment Law. Furthermore, with federal urban renewal categorical grants now terminated, local government must look to community development block grants which are short term in duration, uncertain for smaller cities, and required to fund the entire spectrum of community development needs. Increasing use of tax increment financing has resulted in redevelopment activity in 214 of the 229

* Statistics from *Redevelopment and Tax Increment Financing*, by Ralph Andersen and Associates, 1976.

redevelopment projects currently underway financed by this principal source of redevelopment.*

9. The League believes that tax increment financing authority must exist to support redevelopment.

10. The League believes that State statutes should be amended to clarify and improve uniformity in the use of tax increment financing, as follows:**

a. It is recommended that State law be amended in order to clarify the authority of a redevelopment agency to use tax increment revenue for funding, planning, preparation and implementation of an approved redevelopment plan.

Discussion:

Tax increment revenue is used by a redevelopment agency to repay indebtedness it has incurred in conjunction with redeveloping an area. In some cases, tax increment revenue is only used by redevelopment agencies to repay bonded debt. In other cases, agencies assume that all planning and administrative costs are reimbursable, and some also include expenditures for ongoing services within the area. County personnel are not sure what to accept when an agency indicates that it has incurred indebtedness related to redevelopment activities, redevelopment agency personnel are not sure what to include when asked to report on the nature of indebtedness, and both agree more definite guidelines would be helpful.

The Redevelopment Task Force agreed that a significant consideration in the use of tax increment financing is the savings on interest charges that will accrue if redevelopment plans are implemented without the use of bond financing.

* Statistics from *Redevelopment and Tax Increment Financing*, by Ralph Andersen and Associates, 1976.

** Individual recommendations were made with consideration of recommendations regarding statutory changes presented in *Redevelopment and Tax Increment Financing*, by Ralph Andersen and Associates, 1976.

b. It is recommended that State law be amended to require each redevelopment agency to annually file a uniform statement of indebtedness with the State Controller, county auditor and all local taxing agencies within the project area, and to annually report data about the nature of local redevelopment activity for purposes of on-going legislative consideration of the use of redevelopment and tax increment financing.

Discussion:

Currently, redevelopment agencies must file an annual report of indebtedness with the State Controller. In addition, some counties require an annual statement as proof of indebtedness. However, other counties transmit tax increment revenue automatically to redevelopment agencies without requiring any information regarding project indebtedness. The statements vary from county to county and, because of the complexity of the subject, it is not always clear to the county official what information to ask for or why it is important. Similarly, information on indebtedness available to local taxing agencies within a redevelopment project area varies from county to county.

Information on the nature and magnitude of indebtedness is important in order to be able to analyze the impact of tax increment financing in the future, as well as to compare data on a county by county basis. This recommendation assumes that reporting of indebtedness would be done within a common time frame by all redevelopment agencies, that a uniform reporting format would be used, and that the State Controller, county auditor and local taxing agencies within redevelopment areas would receive the reports.

There will certainly be continuing interest in evaluating the impact of existing and potential uses of redevelopment and tax increment financing by local government. Essential data for this purpose should be periodically provided by redevelopment agencies and should be used by the State Legislature for ongoing evaluation of redevelopment and tax increment financing. The Legislature should direct the State, with input from local officials, to institute a system of obtaining pertinent information from all redevelopment projects.

c. It is recommended that State law be amended to clarify that no agency shall receive tax revenue until indebtedness has actually been incurred, unless a clear plan for using these funds is included in the redevelopment plan.

Discussion:

Consistent with the theory of tax increment financing, in those project areas where issuance of tax increment bonding is to be used, property tax revenue from within the project area should continue to pass through to all local taxing agencies until there is indebtedness to repay. In those projects—usually small in nature—where “pay as you go” financing is contemplated, revenues from the project area may be generated at an earlier time provided there is a clear commitment to expend those funds in the project area on planned redevelopment activities within a reasonable time of their accrual as provided in the redevelopment plan. In addition, the redevelopment plan should disclose the expected amount of project indebtedness, and variations from this indebtedness level should be explained.

11. The League believes that State statutes should be amended to guarantee analysis of redevelopment projects supported by tax increment financing and full disclosure of information to local taxing agencies and others affected by redevelopment funded by tax increment financing as follows:*

a. It is recommended that State law be amended in order that the preliminary redevelopment plan be transmitted to officials of affected local taxing agencies.

Discussion:

Currently, a redevelopment agency is required to notify county tax officials that a redevelopment plan is being prepared following preparation of a preliminary plan by the local planning commission and submission of this plan to the redevelopment agency. The purpose of this recommendation is to add to the existing

* Recommendations were made with consideration of recommendations regarding statutory changes presented in *Redevelopment and Tax Increment Financing*, by Ralph Andersen and Associates, 1976.

notification requirement that county tax officials and officials of affected local taxing agencies have an early indication of what is being considered by receiving a copy of the preliminary redevelopment plan. The preliminary plan should be viewed as the best available estimates of expected redevelopment activity. The League believes that an assessment of the fiscal impact of a redevelopment project on local taxing agencies would be a useful addition to the preliminary plan.

b. It is recommended that State law be amended to require the redevelopment plan and report, as referenced in Section 33352 of the Health and Safety Code, to be distributed to all affected local taxing agencies and that the redevelopment agency consult with officials of local taxing agencies no less than 30 days in advance of the public hearing on adoption of the redevelopment plan.

Discussion:

This recommendation is intended to provide local taxing agencies with more understanding of the impact of a redevelopment project supported by tax increment financing, and more opportunity to have input into the establishment of a redevelopment project area. Transmittal of the redevelopment plan and report, including an assessment of the fiscal impact of the redevelopment project on local taxing agencies, to local taxing agencies would assure availability of complete factual information. The requirement that the redevelopment plan can not be adopted by the legislative body until 30 days after the redevelopment agency consults with local taxing agencies will assure the opportunity for their participation, as well as greater visibility for the redevelopment proposal. The League believes the same procedure should be followed concerning proposed amendments to an adopted redevelopment plan.

c. It is recommended that State law be amended to require redevelopment agencies to estimate the cost of projects at the time they submit a proposed redevelopment plan to the legislative body for consideration.

Discussion:

Additional fiscal information should be included in the redevelopment plan and report presented to the legislative body for consideration. Information on the cost of proposed projects and expected amount of project indebtedness is important to better understand their magnitude in terms of political, planning and financial impact consideration.

12. The League believes that statutory changes concerning the purpose and use of redevelopment and tax increment financing authority, as suggested throughout this policy statement, is the important step in further improving the use of redevelopment and tax increment financing by local government, and that requiring review of proposed redevelopment projects by State agencies would complicate and detract from effective use of redevelopment.

Discussion:

The League believes redevelopment decisions should be made by local government, within the framework of State statutes. However, State agencies can significantly improve local redevelopment efforts. The Department of Housing and Community Development can provide valuable technical assistance and information to local governments interested in improving urban areas impeded by sound, planned and economic development. The Office of Planning and Research can significantly improve the local community development process and therefore planning for the use of redevelopment by adopting, clarifying and coordinating implementation of State development policies and plans.

13. The League believes that several specific amendments in State redevelopment statutes currently being proposed to purportedly improve redevelopment would significantly detract from the effective use of redevelopment and tax increment financing authority. After extensive consideration of the issues, the League must express strong and aggressive opposition to proposed statutory changes as follows:

a. The League opposes referendum coverage for redevelopment activities.

Discussion:

State law provides for a referendum on the formation of a redevelopment agency. The League believes that decisions regarding specific redevelopment activities, including adoption of a redevelopment plan, should be made by elected officials, and that a popular vote on such decisions would excessively constrain the effective use of redevelopment as an essential tool in the local community development process.

b. The League opposes establishment of a fiscal review committee composed of officials of taxing agencies affected by a redevelopment project funded by tax increment financing for purposes of affecting distribution of tax increment revenue.

Discussion:

The League believes that a fiscal review committee is contrary to the tax increment finance process where redevelopment is determined to be the highest and best use of tax resources by the local legislative body, and that such a committee would by-pass the purpose of the representative form of government. A fiscal review committee would also be contrary to the general spirit as well as specific sections of the League's redevelopment policy.

c. The League opposes application of an inflationary index to redevelopment projects funded by tax increment financing.

Discussion:

The League believes that the cost of redevelopment will inflate at a similar rate to the general rate of inflation, and that tax increment revenue resulting from inflation is necessary to meet those costs. In addition, the League believes an equitable index would be impossible to establish.

d. The League opposes establishment of uniform time limitations for redevelopment projects.

Discussion:

The League believes that the expected duration of redevelopment projects should be included in redevelopment plans. This determination should be made at the local level. The State should not set arbitrary time limitations which may prove neither practical nor realistic.

Exhibit C

City of San Jose Redevelopment Agency
801 N. First Street, San Jose, California 95110
(408) 277-4766

Dear Property Owner, Tenant,
or Business Person:

The Joint Public Hearing to consider amendments to the Pueblo Uno Redevelopment Plan, originally scheduled for 7 p.m., November 15, 1983, has been continued to 7:00 p.m., Tuesday, December 6, 1983, in the City Council Chambers, City Hall, located at 801 North First Street, San Jose, California.

At this Public Hearing, plan amendments concerning eminent domain and land acquisition, land uses and controls, and administrative provisions affecting plan implementation will be considered.

Written or oral testimony may be presented at this Joint Public hearing, or submitted to the Redevelopment Agency any time prior to the Public Hearing on December 6. For further information regarding the proposed amendments to the Pueblo Uno Redevelopment Plan, please contact the Redevelopment Agency offices at (408) 277-4744.

/s/ HARRY MAVROGENES
Harry Mavrogenes
Downtown Coordinator

Appendix G

Herbert F. Kaiser, Esq.
The Alcoa Building, Suite 1250
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 392-1184

Attorney for Plaintiffs-Appellants
David A. Boone, Stephen P. Fox and DSB-2 Investments

United States Court of Appeals
For the Ninth Circuit

No. 86-2506
DC# CU-84-20772 WAI
Northern California
San Jose

David A. Boone and Stephen P Fox
individually and as general partners of
DSB-3 Group, et al.,
Plaintiffs-Appellants,

vs.

Redevelopment Agency of the
City of San Jose, et al.,
Defendants-Appellees.

Appendix

Appellants' Request to Take Judicial Notice

PLEASE TAKE NOTICE that pursuant to Rule 201, Federal Rules of Evidence, Appellants hereby request that the Court take Judicial Notice of the following Public Documents, Records of Legislative Proceedings and Public Notices:

American Bank & Trust Building Grant Deed to Koll 10/2/84;

Carl Swenson Building Quit Claim Deed to Koll 10/3/86;

Foreclosure of Takamoto Building Notice of Default 9/18/86;

Notice of Trustee Sale Takamoto Building 1/13/87;

San Jose Ordinance #21510 re 12/6/83 Amended Redevelopment Plan;

1982-1983 Budgets for 600 Car Garage at Market and Post, property which was given to Koll.

Appellants further request that the Court take Judicial Notice of Pueblo Uno Redevelopment Plan 12/6/83 Ordinance #21521, CR 130, EX B, ER 1411-1442.

With Respect to the above, Appellants attach hereto what the undersigned counsel certifies to be true and correct copies.

Dated: March 20, 1987

/s/ HERBERT J. KAISER
Attorney for Plaintiffs-
Appellants

Escrow or Loan No. 906971-07

Recording Requested by
Santa Clara Land Title Company

When Recorded Mail to:

The Koll Company
KOLL AMERICAN BANK ASSOCIATES
1651 North First Street
San Jose, California 96112

FILOR REQUEST STAMPS NOT BE RECORDED

Signature of Declarant or Agent
determining time—Firm Name

Corporation Grant Deed

FOR A VALUE CONSIDERATION, receipt of which is hereby acknowledged.

GREEN VALLEY CORPORATION, a California corporation, hereby GRANT(S) to Koll American Bank Associates, a California General Partnership, the real property in the City of San Jose, County of Santa Clara.

See "Exhibit A" attached hereto and made a part hereof for legal description.

Dated October 1, 1984.

State of California.

On October 1, 1984 before me, the undersigned, a Notary Public in and for said State, personally appeared C. B. Swenson.

/ss/ LORRAINE LARSON

Lorraine Larson

Name (Typed or Printed)

GREEN VALLEY CORPORATION, a California Corporation.

[Seal]

[Legal Description has been removed in printing]

Recording Requested by:

First American Title Guaranty Company
Escrow No. 502371

When Recorded Mail to:

KA 95 South Market Associates
c/o The Koll Company
1731 Technology Avenue, Suite 300
San Jose, California 95110
Attn: Ms. Jane F. Vaughan

Mail Tax Statements to:

Same as Above

Filed for Record at Request of
Oct 3 2 21 PM '86
Official Records
Santa Clara County
Laurie Kane, Recorder
J870Page1631

Apr2 § 9.40-84

(Above Space for Recorder's Use Only)

Quitclaim Deed

The undersigned grantor declares:

Documentary Transfer Tax not shown pursuant to Section
11932 of the Revenue and Taxation Code and
, as amended

City of San Jose

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, a Wisconsin corporation ("Grantor"), hereby remises, releases and quitclaims all its right, title and interest in and to the following described real property located in the City of San Jose, County of Santa Clara, State of California to KA 95 SOUTH MARKET ASSOCIATES, A CALIFORNIA GENERAL PARTNERSHIP:

See Exhibit "A" attached hereto and incorporated herein by this reference.

The quitclaim herein is intended to include but is not limited to the undersigned's interest in, under and to that certain Ground Lease dated July 24, 1974, more particularly described in a Memorandum of Ground Lease recorded in Book C398, Page 697 of the official records ("Official Records") of the Santa Clara County Recorder's office, including any amendments or addenda thereto; provided, however, that the interest of Grantor in such property by reason of that certain Deed of Trust dated December 19, 1978, recorded December 20, 1978, in Book E176, Page 661 of Official Records, as the same may be modified from time to time, is specifically excluded from the quitclaim hereunder.

DATED: September 10, 1986

The Northwestern Mutual Life Insurance Company, a Wisconsin corporation

By /s/ GLENN W. BUZZARD
Its Vice President,
Glenn W. Buzzard

By /s/ MARVIN A. HANSEN
Its Ass't Secretary,
Marvin A. Hansen

[Legal Description removed in printing]

Recording Requested by
T. D. Service Company
and when recorded mail to

T. D. Service Company
1990 North California Blvd.
Suite 716
Walnut Creek, Ca 94596-3787

Filed for Record at Request of
T. D. Service Co.
Sep 18 1 54 PM '86
Official Records
Santa Clara County
Laurie Kane, Recorder
J850 Page 566

Notice of Default and Election to Sell Under Deed of Trust
Loan No. 40076-02-55/Market St. Centre
T.S. No. Z63684
Unit Code Z

"Important Notice"

IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS, IT MAY BE SOLD WITHOUT ANY COURT ACTION, and you may have the legal right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account, which is normally five business days prior to the date set for the sale of your property. No sale date may be set until three months from the date this notice of default may be recorded (which date of recordation appears on this notice).

This amount is \$149,757.07 as of September 30, 1986 and will increase until your account becomes current. You may not have to pay the entire unpaid portion of your account even though full payment was demanded, but you must pay the amount stated above. However, you and your beneficiary or mortgagee may mutually agree in writing prior to the time the notice of sale is

posted (which may not be earlier than the end of the three-month period stated above) to, among other things, (1) provide additional time in which to cure the default by transfer of the property or otherwise; or (2) establish a schedule of payments in order to cure your default; or both (1) and (2).

Following the expiration of the time period referred to in the first paragraph of this notice, unless the obligation being foreclosed upon or a separate written agreement between you and your creditor permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by your creditor.

To find out the amount you must pay, or to arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason, contact:

Debra Stone
Gateway Savings Bank
393 13th Street
Oakland, CA 94612
415-874-4945

If you have any questions, you should contact a lawyer or the government agency which may have insured your loan. Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure. Remember, **YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION.**

In addition to the amount stated above, should any prior taxes, liens, or encumbrances be delinquent or become delinquent, and the loan can be reinstated, said delinquencies must be cured as a condition of reinstatement.

NOTICE OF DEFAULT AND ELECTION TO SELL
UNDER DEED OF TRUST

Loan No. 40076-02-55/MARKET ST. CENTRE
T.S. No. Z63684
UNIT CODE: Z

NOTICE IS HEREBY GIVEN: THAT T.D. SERVICE COMPANY is duly appointed Trustee under the following described deed of trust:

TRUSTOR: THE MARKET STREET CENTRE PARTNERS

BENEFICIARY: GATEWAY SAVINGS BANK

record March 25, 1985 as Instr. NO. 8359915 In Book J 300 page 1366 of Official Records in the office of the Recorder of Santa Clara County;

said deed of trust secures certain obligations including one note for the sum of \$3,100,000.00

That the beneficial interest under such deed of trust and the obligations secured thereby are presently held by the undersigned; That a breach of, and default in, the obligations for which such deed of trust is security has occurred in that payment has not been made of:

The installment of principal and interest which became due June 15, 1986, and all subsequent installments of principal and interest. All late charges due. The sum of \$972.86, advanced by the Beneficiary in payment of the May 15, 1986 payment (taken from escrow).

In addition to the default stated above, should any prior taxes, liens or encumbrances be delinquent or become delinquent, or should the Beneficiary advance sums to protect their security, said delinquencies must be cured as a condition of reinstatement or payoff.

That by reason thereof, the undersigned, present beneficiary under such deed of trust, has executed and delivered to said duly appointed Trustee, a written Declaration of Default and Demand for sale, and has deposited with said duly appointed Trustee, such

A-138

deed of trust and all documents evidencing obligation secured thereby, and has declared and does hereby declare all sums thereby immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby.

DATED: September 17, 1986

GATEWAY SAVINGS BANK
By T.D. SERVICE COMPANY,
Its Attorney-in-Fact

BY: JUNE CHRISTY
June Christy, Assistant Secretary

Recording Requested by
T.D. Service Company
and when recorded mail to
T.D. Service Company
1990 North California Blvd.
Suite 716
Walnut Creek, CA 94596-3787
(415) 944-9015

Filed for Record at Request of
T.D. Service Co.
Jan 13 3:01 PM '87
Official Records
Santa Clara County
Laurie Kane, Recorder

Notice of Trustee's Sale

Loan No. 40076-02-55/Market St. Centre
T.S. No. Z63684
Unit Code Z

T.D. Service Company

as duly appointed Trustee under the following described deed of trust WILL SELL AT PUBLIC AUCTION TO THE HIGHEST BIDDER FOR CASH (in the forms which are lawful tender in the United States) and/or the cashier's, certified or other checks specified in the Civil Code (Payable in full at the time of sale) all right, title and interest conveyed to and now held by it under said Deed of Trust in the property hereinafter described:

Trustor:

The Market Street Centre Partners

Beneficiary: Gateway Savings Bank

recorded March 25, 1985 as Instr. No. 8359915 In Book J 300
page 1386 of Official Records in the office of the Recorder of
Santa Clara County;

said deed of trust describes the following property: SEE ATTACHED EXHIBIT

YOU ARE IN DEFAULT UNDER A DEED OF TRUST DATED 3/21/85. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING AGAINST YOU, YOU SHOULD CONTACT A LAWYER.

80 SOUTH MARKET STREET, SAN JOSE, CA "(if a street address or common designation of property is shown above, no warranty is given as to its completeness or correctness)." The beneficiary under said Deed of Trust, by reason of a breach or default in the obligations secured thereby, heretofore executed and delivered to the undersigned a written Declaration of Default and Demand for Sale, and written notice of default and of election to cause the undersigned to sell said property to satisfy said obligations, and thereafter the undersigned caused said notice of default and of election to be recorded September 18, 1986 as Instr. No. 8950880 In Book J850 page 566 of Official Records in the office of the Recorder of Santa Clara County;

Said Sale will be made, but without covenant or warranty, express or implied, regarding title possession, or encumbrances, to pay the remaining principal sum of the note(s) secured by said deed of Trust, with interest as in said note provided, advances, if any, under the terms of said Deed of Trust, fees, charges and expenses of the Trustee and of the trusts created by said Deed of Trust. Said sale will be held on:

Wednesday, February 11, 1987, at 1:00 p.m. at the front entrance to the County Courthouse, 190 N. Market St., San Jose CA.

At the time of the initial publication of this notice, the total amount of the unpaid balance of the obligation secured by the above described deed of trust and estimated costs, expenses, and advances is \$3,384,036.44. It is possible that at the time of sale the opening bid may be less than the total indebtedness due. If available, the expected opening bid may be obtained by calling the following telephone numbers on the day before the sale: (415) 945-6418.

Date: January 6, 1987

T.D. Service Company
as said Trustee,

By _____
Kayo Minson-Tompkins, Assistant
Secretary
1990 N. California Blvd.
Ste. 716,
Walnut Creek, CA 94596-3787
(415) 944-9015

PARCEL ONE:

Portion of Lots 10 and 11, in Block 1 Range 1 North, as shown upon that certain Map entitled, "City of San Jose, copied from the original Map drawn by Sherman Day, Civil Engineer", which was filed for record in the office of the Recorder of the County of Santa Clara, State of California, in Volume "A" of Maps, at pages 72 and 73, and more particularly described as follows:

BEGINNING at a point on the Northeasterly line of South Market Street, distant Northwesterly thereon 137.84 feet from its intersection with the Northwesterly line of San Fernando Street, said point of beginning being also the most Southerly corner of Lot 10, in Block 1, as shown upon the above Map; running thence Northeasterly along the Southeasterly line of Lot 10, and continuing along the Southeasterly line of Lot 11, said Block 1, 206.75 feet to the most Southerly corner of the property now or formerly of Messing Estate Company, a corporation, running thence Northwesterly and along the Southwesterly line of the property described as Parcel 5 in that certain Decree of Distribution entered June 25, 1934 in the Matter of the Estate of Peter H. Stock, Deceased, a certified copy of which Decree was recorded June 25, 1934 in Volume 694 of Official Records, page 140, for a distance of 52 feet to the most Easterly corner of that certain Parcel of land conveyed to First National Bank of San Jose, a corporation, by Trustee's Deed dated May 10, 1933 and recorded May 11, 1933 in Volume 650 of Official Records, at page 213, running thence Southwesterly and along the Southeasterly line of the property so conveyed to the First National Bank of San Jose, 206.75 feet to the Northeasterly line of South Market Street; thence Southeasterly along said Northeasterly line of South Market Street, 52 feet to the point of beginning.

PARCEL TWO:

PORTION of lots 10 and 11 in Block 1 Range 1 North, as shown upon that certain Map entitled, "City of San Jose, copied from the original Map drawn by Sherman Day, Civil Engineer", which map was filed for record in the office of the Recorder of the County of Santa Clara, State of California, in Book A of Maps, at pages 72 and 73, and more particularly described as follows:

BEGINNING at a point on the Northeasterly line of Market Street, distant thereon Northwesterly 52 feet from its intersection with the Southeasterly line of Lot 10 in Block 1 Range 1 North, as shown upon the Map above referred to; running thence Northeasterly at right angles to said Northeastern line of Market Street and parallel with the Southeastern line of Lots 10 and 11 in Block 1 Range 1 North above referred to, 206.75 feet to the face of a brick wall; thence at right angles Northwesterly along the face of said brick wall and parallel with the said Northeastern line of Market Street 19 feet; thence at right angles Southwesterly 30 feet; thence at right angles Southeasterly and parallel with the said Northeastern line of Market Street 12 feet and 6 inches; thence at right angles Southwesterly and parallel with the Southeastern line of Lots 10 and 11 in Block 1 Range 1 North above referred to, 176.75 feet to the said Northeastern line of Market Street, thence Southeasterly along the Northeastern line of Market Street, 6 feet 6 inches to the point of beginning.

Ordinance No. 2510

Ordinance of the City of San Jose Approving and Adopting an Amendment to the Redevelopment Plan Entitled, "Second Amended Redevelopment Plan Pueblo Uno Project"; Addressing Findings and Determinations Respecting Certain Matters as Required by Law; and Otherwise Relating to Said Redevelopment Plan and Amendment

Recorded January 20, 1984
Santa Clara County Recorder
Serial # 7953712; Book I246;
Pages 98-100

THE CITY COUNCIL OF THE CITY OF SAN JOSE
DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. The City Council, after a public hearing held at 7:00 p.m., on December 6, 1983 makes the following findings of fact:

A. This Council by its Ordinances No. 17778, 20677 and 21417 has heretofore adopted a Redevelopment Plan entitled, "Second Amended Redevelopment Plan Pueblo Uno Project, as the official Redevelopment Plan for the Pueblo Uno Project area; and

B. Pursuant to the Community Redevelopment Law of the State of California, (Health and Safety Code, Sections 33000, et seq.) the Redevelopment Agency of the City of San Jose has submitted to this Council for consideration a Third Amendment to said Redevelopment Plan; and

C. The proposed amendment includes administrative and project plan implementation amendments to the Redevelopment Plan attached hereto and incorporated herein by this reference; and

D. The proposed amendment does not affect the General Plan within the meaning of the Community Redevelopment Law; and

E. Said Community Redevelopment Law requires that this Council consider said Third Amendment to said Redevelopment

Plan at a public hearing and allows a joint public hearing with said Redevelopment Agency; and

F. This Council and said Agency did cause notice to be published in form and substance and within the time and manner prescribed by said Community Redevelopment Law, that said Redevelopment Agency and this Council would conduct a joint public hearing on said Third Amendment to the Redevelopment Plan at the hour of 7:00 p.m. on the 6th day of December, 1983, in the City Council of City Hall of the City of San Jose, First and Mission Streets, San Jose, California; and

G. At said hearing this Council did consider said Third Amendment to said Redevelopment Plan and all evidence or testimony regarding the content thereof and all evidence or testimony for or against the adoption thereof and any and all changes thereto; and

H. Said hearing did comply in all respects with said Community Redevelopment Law and was conducted in accordance with and as required by the laws of the State of California pertaining to such hearing;

I. The Third Amendment to the Redevelopment Plan for Pueblo Uno Project area is necessary and desirable in order to carry out the redevelopment plan for the Project area.

J. The proposed method of financing the project as amended has been previously submitted to and approved by the Agency Board and City Council as part of the 1983-84 Capital Improvement Program for the Pueblo Uno Project Area.

K. The condemnation of real property in the Project Area is necessary for the execution of the Redevelopment Plan.

L. The Agency has a feasible method or plan for the relocation of families and persons displaced from the Project Area, if the redevelopment plan may result in the temporary or permanent displacement of any occupants of housing facilities in the Project Area.

M. There are or are being provided in the public utilities and public and commercial facilities and at rents or prices within the

financial means of the families and persons displaced from the Project Area, decent, safe, and sanitary dwellings equal in number to the number of and available to such displaced families and persons and reasonably accessible to their places of employment.

Section 2. This Council has considered all objections to the proposed Amended Redevelopment Plan and the evidence presented to the proposed Amended Redevelopment Plan and the evidence presented by the Redevelopment Agency, and hereby overrules such objections as not supported by the evidence presented.

Section 3. The plan entitled, "Third Amended Redevelopment Plan Pueblo Uno Project" is hereby approved and adopted, is hereby designated as the official Redevelopment Plan for the Pueblo Uno Project area and shall supercede the Redevelopment Plan approved, adopted and amended in prior ordinances to the extent provided hereinafter. Said Third Amended Redevelopment Plan is on file in the office of the City Clerk and the Redevelopment Agency of the City of San Jose, and said Third Amended Redevelopment Plan by this reference is incorporated herein and made a part hereof. All references to said Redevelopment Plan in previous ordinances adopting or modifying the Plan shall be taken to mean the Plan as it has been amended, unless the context otherwise requires.

Section 4. This ordinance shall become effective immediately upon adoption after publication of title.

A-147

PASSED FOR PUBLICATION OF TITLE this 6th day of
December, 1983, by the following vote:

Ayes: Alvarado, Beall, Estruth, Fletcher, Hammer, Ianni,
Lewis, Ryden, Sausedo, Williams

Noes: None

Absent: None

Abstain: McEnery

/s/ THOMAS McENERY
Thomas McEnery, Mayor

Attest:

/s/ HELEN E. JACKSON
Helen E. Jackson, City Clerk

RESOURCES

Merged Area Redevelopment Capital Improvement
Fund—Pueblo Uno Account #451:

Beginning Fund Balance	\$ 29,000
Interest Income	200,000
Payments from Redevelopment Agency	<u>5,471,000</u>
Total Resources	\$5,700,000

Use of Funds

Project	Cost
1. Market and Post Street Garage	
Construction of a 600 space parking garage on existing city surface parking lot #5, with retail below and offices above constructed by the developers	Construction \$5,000,000 Eng.-Insp. <u>700,000</u> <u>\$5,700,000</u>
Project included in 1982-87 Five- Year Capital Improvement Program, Project #1. Award of contract dependent upon developer commitments.	
Total Use of Funds	<u><u>\$5,700,000</u></u>

Appendix H

[Letterhead]

November 17, 1987

United States Court of Appeals for the Ninth Circuit
Post Office Building
7th and Mission Streets
P.O. Box 547
San Francisco, CA 94101

Re: Boone, et al. v. Redevelopment Agency of the City of
San Jose, et al., Case No. 86-2506; DC CV-84-20772-WAI

To the Honorable Court:

Pursuant to the Court Order dated September 30, 1987 appellants submit original and three copies of the District Court Order pursuant to Rule 54(b) dated November 13, 1987, certifying that there is no just reason for delaying the appeal and decision thereon.

Appellants request that the Court take judicial notice pursuant to Rule 201(f) Federal Rules of Evidence and the subsequent developments since oral argument on May 12, 1987, that are of public record and relevant to the appeal, to wit:

- Exhibit 1. A copy of the Notice of Default and foreclosure proceedings on appellants Market/Post office building;
- Exhibit 2. A copy of appellants Petition in Bankruptcy under Chapter 11;
- Exhibit 3. A copy of the completion of foreclosure proceedings against the Takomoto Building in the project area previously referred to in Appellants Reply Brief, page 1, line 16.

Respectfully submitted,

/s/ HERBERT F. KAISER
Herbert F. Kaiser

Enclosures

cc: James Gilliland, Esq.
Gary B. Reiners, Esq.
Joseph Diciuccio, Esq.
David T. Alexander, Esq.

Exhibit 1

**Notice of Default and Election to Sell Under Deed of Trust
Important Notice**

Notice is Hereby Given: That Verdugo Service Corporation is now duly appointed Trustee under a Deed of Trust dated 02/11/86 executed by: Market/Post Ltd., a California Limited Partnership as Trustor, to secure obligations in favor of: Glendale Federal Savings and Loan Association, a United States Corporation as Beneficiary Recorded on 03/10/86 as document no. 8713656, book J625, page 70, of Official Records in the office of the Recorder of Santa Clara County, California describing the land therein: as more fully described on said Deed of Trust.

Including 1 note(s) for the sum of \$42,150,000.00 that the beneficial interest under said Deed of Trust and the obligations secured thereby are presently held by the beneficiary. That a breach of and default in, the obligation for which said Deed of Trust is security has occurred in that the payment in that the payment has not been made of: The 03/01/87 payment of principal and/or interest and subsequent payments, together with late charges, impounds, advances, taxes, delinquent payments on senior liens, or assessments if any.

That by reason _____, the present beneficiary under such Deed of Trust, has executed and delivered to said Trustee, a written Declaration and Demand for Sale, and has deposited with said Trustee, such Deed of Trust and all the documents evidencing the obligations secured thereby, and has declared and does hereby declare all sums secured thereby, immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured thereby.

DATE: 07/06/87

Glendale Federal Savings & Loan
Association

W.J. McMILLAN
W.J. McMillan, Vice-President

L.W. McMAHON
L.W. McMahon, Asst. Vice-President

NOTICE OF DEFAULT AND ELECTION TO SELL

Exhibit 2

Campeau & Grube
Attorney for Petitioner
55 S. Market St, #1040
San Jose, CA 95113
(408) 295-9555

Miller & Gianini
84 W. Santa Clara St, #800
San Jose, CA 95113
(408) 294-9046

United States Bankruptcy Court
for the Northern District of California

Case No. 587 04067

In re Market/Post Ltd.,
a California Limited Partnership, Debtor

Set forth all names including trade names used by Debtor
within the last six years.

Social Security No.

Debtor's Employer Identification No.

Voluntary Petition Under Chapter Eleven

- ☐ Individual ☐ Husband and Wife
☐ Corporation ☒ Partnership

1. Petitioner's mailing address, including county, is 55 South Market Street, Suite 1000 San Jose, CA 95113 (County of Santa Clara).

2. Petitioner (1) has had its principal place of business within this district (2) for the preceding 180 days.

3. Petitioners are qualified to file this petition and are entitled to the benefits of Title Eleven, United States Code as a voluntary debtor.

4. *If petitioner is an individual whose debts are primarily consumer debts.* Petitioner is aware that they may proceed under

Chapter 7 or 13 of Title 11, United States Code, understands the relief available under such chapter, and chooses to proceed under Chapter 11 of such title.

5. *If petitioner is an individual whose debts are primarily consumer debts and such petitioner is represented by an attorney,* A declaration or an affidavit in the form of Exhibit B is attached to and made a part of this petition.

7. ☐ A copy of petitioner's proposed plan dated the _____ is attached.

☒ Petitioner intends to file a plan pursuant to Chapter Eleven of Title Eleven, United States Code.

Wherefore, Petitioner prays for relief in accordance with Chapter Eleven, United States Code.

Petitioner signs if not represented by an
attorney

Petitioner

Attorney for Petitioner

55 South Market St., Suite 1040
San Jose, CA 95113

-
- (1) Insert "has resided" or "has had his domicile" or "has had his principal place of business" or "has had his principal assets within this district."
- (2) Insert "for the preceding 180 days" or "for a longer portion of the preceding 180 days in any other district."

Exhibit 3

____ Recording Requested by
T.D. Service Company

AND WHEN RECORDED MAIL TO
Gateway Savings Bank
393 13th Street Oakland, CA 94612

Filed for record at request of
T.D. Service Co.
Oct. 9 12:27 pm '87

Official records Santa Clara County

Laurie Kane, Recorder

____ Space Above This Line For Recorders Use
K320 Page 1191

The undersigned declares under penalty of perjury that the following declaration is true and correct:

- 1) The grantee herein was the foreclosing beneficiary
 - 2) The amount of the unpaid debt together with costs was . . \$3,651,389.70
 - 3) The amount paid by the grantee at the trustee's sale was \$3,651,389.70
 - 4) The documentary transfer tax is \$ 0.00
 - 5) The city transfer tax is \$ 0.00
 - 6) Said property is in the City of San Jose, County of Santa Clara
- AP# 259 40 067 T.D. Service Company

Dated October 7, 1987

By _____
KAYO MANSON-TOMPKINS, ASST. SECRETARY

TRUSTEE'S DEED UPON SALE

Loan No. 40076-02-55/Market St. Centre
T.S. No. Z63684
UNIT CODE Z

**THE GRANTEE IS THE FORCLOSING BENEFICIARY
UNDER A FIRST DEED OF TRUST**

This Indenture is made with reference to the Deed of Trust hereinafter described and is made between

T.D. SERVICE COMPANY

(herein called Trustee), and the Grantee hereinafter named.

TRUSTOR:

THE MARKET STREET CENTRE PARTNERS
BENEFICIARY: GATEWAY SAVINGS BANK

recorded March 25, 1985 as Instr. No. 8359915 in Book J 300
page 1386 of Official Records in the office
of the Recorder of Santa Clara County:

said deed of trust describes the following property:

SEE ATTACHED EXHIBIT

Whereas, the above named trustor did, by the trust deed referred to above, grant and convey to the trustee named therein, the property heretofore described to secure, among other obligations, payment of a note or notes with interest according to the terms thereof and Whereas, the holder of said note did execute and deliver to trustee written declaration of default and demand for sale and notice of default and election to cause the undersigned to sell said property which notice was recorded September 18, 1986 as Instr. No. 8950880 in Book J850 page 566 of Official Records in the office of the Recorder of Santa Clara County;

Thereafter, a notice of trustee's sale, stating that said trustee would sell the above described property at public auction to the highest bidder for cash on February 11, 1987, at 1:00 p.m. at the front entrance to the County Courthouse, 190 N. Market St., San Jose, CA at which time and place, and thereafter in like manner, said Sale was postponed by (Mesne) public announcement to October 7, 1987, at the same time and place.

PARCEL ONE:

Portion of Lots 10 and 11, in Block 1 Range 1 North, as shown upon the certain Map entitled, "City of San Jose, copied from the original Map drawn by Sherman Day, Civil Engineer", which Map was filed for record in the office of the Recorder of the County of Santa Clara, State of California, in Volume "A" of Maps, at pages 72 and 73, and more particularly described as follows:

BEGINNING at a point on the Northeasterly line of South Market Street, distant Northwesterly thereof 137.84 feet from its

intersection with the Northwesterly line of San Fernando Street, said point of beginning being also the most Southerly corner of Lot 10, in Block 1, as shown upon the above Map; running thence Northeasterly along the Southeasterly line of said Lot 10, and continuing along the Southeasterly line of Lot 11, said Block 1, 206.75 feet to the most Southerly corner of the property now or formerly of Messing Estate Company, a corporation, running thence Northwesterly and along the Southwesterly line of the property described as Parcel 5 in that certain Decree of Distribution entered June 25, 1934 in the Matter of the Estate of Peter H. Stock, Deceased, a certified copy of which Decree was recorded June 25, 1934 in Volume 694 of Official Records, page 140, for a distance of 52 feet to the most Easterly corner of that certain Parcel of land conveyed to First National Bank of San Jose, a corporation, by Trustee's Deed dated May 10, 1933 and recorded May 11, 1933 in Volume 650 of Official Records, at page 213, running thence Southwesterly and along the Southeasterly line of the property so conveyed to the First National Bank of San Jose, 206.75 feet to the Northeasterly line of South Market Street; thence Southeasterly along said Northeasterly line of South Market Street, 52 feet to the point of beginning.

PARCEL TWO:

PORTION of Lots 10 and 11 in Block 1 Range 1 North, as shown upon that certain Map entitled, "City of San Jose, copied from the original Map drawn by Sherman Day, Civil Engineer", which map was filed for record in the office of the Recorder of the County of Santa Clara, State of California, in Book A of Maps, at pages 72 and 73, and more particularly described as follows:

BEGINNING at a point on the Northeasterly line of Market Street, distant thereon Northwesterly 52 feet from its intersection with the Southeastern line of Lot 10 in Block 1, Range 1 North, as shown upon the Map above referred to; running thence Northeasterly at right angles to said Northeastern line of Market Street and parallel with the Southeastern line of Lots 10 and 11 in Block 1 Range 1 North above referred to, 206.75 feet to the face of a brick wall; thence at right angles Northwesterly along the face of said brick wall and parallel with the said Northeastern line of Market Street 19 feet; thence at right angles Southwesterly 30

feet; thence at right angles Southeasterly and parallel with the said Northeastern line of Market Street 12 feet and 6 inches; thence at right angles Southwesterly and parallel with the Southeastern line of Lots 10 and 11 in Block 1 Range 1 North above referred to, 176.75 feet to the said Northeastern line of Market Street, thence Southeasterly along the Northeastern line of Market Street, 6 feet 6 inches to the point of beginning.

said notice was posted for not less than twenty days before the date of sale there fixed, as follows: in one public place in the said city of San Jose

wherein said property was to be sold, to wit: on a bulletin board

INSIDE THE COUNTY COURTHOUSE, 190 N. MARKET STREET, SAN JOSE, CA

and also in a conspicuous place on said property to be sold; and said Trustee did cause a copy of said Notice to be published once a week for twenty days before the date of sale therein fixed in

SAN JOSE POST-RECORD

a newspaper of general circulation printed and published in the city or district in which said real property is situated, the first date of such publication being January 21, 1987; and

Said notice was also recorded at least 14 days prior to the sale in the office of the county recorder of the county in which the property heretofore described is located.

Whereas, copies of said recorded Notice of Default and of said Notice of Sale were mailed, served or published in accordance with Section 2924b of the Civil Code to or upon all those who were entitled to special notice of said sale as in said section provided; and

Whereas, all applicable statutory provisions of the State of California and all of the provisions of said Deed of Trust have been complied with as to acts to be performed and notices to be given; and

Whereas, Trustee did at the time and place of sale fixed as aforesaid, then and there sell, at public auction, to said Grantee, being the highest bidder therefor, the property hereinafter de-

scribed, for the sum of \$3,651,389.70 by the satisfaction of the indebtedness then secured by said Deed of Trust.

Now, therefore, Trustee in consideration of the premises recited and of the sum above mentioned bid and paid by Grantee, the receipt whereof is hereby acknowledged, and by virtue of the authority vested in it by said Deed of Trust, does, by these presents GRANT AND CONVEY without any covenant or warranty, express or implied all that certain property hereinbefore described, to

GATEWAY SAVINGS BANK

In Witness Whereof, the undersigned caused its corporate name and seal to be hereunto affixed

Dated October 8, 1987

T.D. SERVICE COMPANY

KAREN MERKEL

Karen Merkel, Asst. Vice President

KAYO MARSON-TOMPKINS

Kayo Marson-Tompkins,
Asst. Secretary

STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA

On October 8, 1987 before me, the undersigned, a Notary Public in and for said State personally appeared KAREN MERKEL, known to me to be the Asst. Vice President, and KAYO MANSON-TOMPKINS, known to me to be the Asst. Secretary of the Corporation that executed the within instrument, known to me (or proved to me on the basis of satisfactory evidence) to be the persons who executed the within instrument, on behalf of the Corporation therein named, and acknowledged to be such Corporation executed the within instrument pursuant to its by-laws or a resolution of its board of directors.

WITNESS my hand and official seal.

TRACILYN MORRIS
Tracilyn Morris

[Seal]

Appendix I

Khourie & Crew
Michael N. Khourie
James G. Gilliland, Jr.
Mark T. Jansen
101 California Street, Suite 1550
Sna Francisco, CA 94111
Telephone: (415) 982-1550

Gary B. Rieners, Esq.
General Counsel
151 East Mission Street
San Jose, CA 95110
Telephone: (408) 277-4454

Attorneys for Defendant
Redevelopment Agency of the
City of San Jose

Robert J. Logan
City Attorney
Daniel J. Wallace
Chief of Litigation
151 West Mission Street
San Jose, CA 95100
Telephone: (408) 277-4454

Attorneys for Defendant
City of San Jose

United States District Court
Northern District of California

CASE NO. C-84-20772 WAI

Docket # 56

David A. Boone, and Stephen P. Fox, individually and as
General Partners of DSC-3 Group, a California limited
partnership, and as General Partners of Market/Post, Ltd., a
California limited partnership; Dave Goglio and Donald Goglio,
individually and as general partners of Three G's a California
limited partnership,
Plaintiffs,

vs.

Redevelopment Agency of the City of San Jose, a Public Body
Corporate and Politic of the State of California; City of San
Jose, a Municipal Corporation and Subdivision of the State of
California; the Koll Company, a California corporation,
Defendants.

ORDER RE:
DISCOVERY AND BRIEFING SCHEDULE
[Filed April 25, 1985]

A discovery and scheduling conference was held in this Court
on April 10, 1985. All parties appeared through their counsel of
record. After consideration of the arguments of the parties and
being fully advised in the premises, IT IS HEREBY ORDERED
THAT:

1. Defendants have agreed to stipulate that plaintiffs
may file their Amended Complaint without prejudice to any
subsequent motions any defendant may wish to file regarding
its rights or claims, if any, arising from plaintiffs' filing of
their original Complaint or amendment of their Complaint;
2. Defendants which have not yet done so shall file
motions to dismiss the Amended Complaint under
Fed.R.Civ.P. 12 and supporting briefs on or before 5:00 p.m.,
April 22, 1985;
3. Plaintiffs shall respond to defendants' motions to dis-
miss on or before 5:00 p.m., May 7, 1985;
4. Defendants shall file reply briefs in support of their
motions to dismiss on or before 5:00 p.m., May 14, 1985;

5. Argument of defendants' motions to dismiss the Amended Complaint shall be heard May 20, 1985;

6. Defendants' pending motions for judgment on the pleadings directed to plaintiffs' original Complaint are withdrawn;

7. No further discovery shall be undertaken until after May 20, 1985;

8. No defendant shall file any motion regarding rights or claims it alleges to have resulting from plaintiffs' filing of their original Complaint or amendment of their Complaint until after May 20, 1985; and

9. Plaintiffs shall have the statutory time to respond to any motions filed by any defendant regarding rights or claims it alleges to have as a result of plaintiffs' amendment of their Complaint.

Dated:

Approved as to form:

JAMES G. GILLILAND, JR.

James G. Gilliland, Jr.
On behalf of defendants
Redevelopment Agency of
San Jose and City
of San Jose

DAVID T. ALEXANDER

David T. Alexander
On behalf of defendant, Koll
Company

HERBERT F. KAISER

Herbert F. Kaiser
On behalf of plaintiffs,
David Boone, et al.

IT IS SO ORDERED

WILLIAM A. INGRAM

William A. Ingram
U.S. District Judge

Appendix J

Herbert F. Kaiser, Esq.
Law Offices of Herbert F. Kaiser
Alcoa Building, Suite 1250
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 392-2255
Attorney for Plaintiffs

United States District Court
Northern District of California
CASE NO. C-84-20772 WAI
Docket #89

David A. Boone and Stephen P. Fox, individually and as
general partners of DSC-3 Group, a California Limited
Partnership, as general partners of Market/Post, Ltd., a
California Limited Partnership; Dave Goglio and Donald
Goglio, individually and as general partners of Three G's, a
California Limited Partnership,
Plaintiffs,

vs.

Redevelopment Agency of the City of San Jose, a Public Body
Corporate and Politic of the State of California; City of San
Jose, a Municipal Corporation and Subdivision of the State of
California; Frank Taylor; the Koll Company, a California
Corporation,
Defendants.

Date: October 8, 1985

Time: 9:00 a.m.

Court Room: Honorable William A. Ingram

**DECLARATION OF HERBERT F. KAISER IN SUPPORT
OF PLAINTIFFS' COUNTER-MOTION FOR ORDER
SEVERING HEARING AND IN OPPOSITION TO MO-
TIONS OF DEFENDANT CITY FOR RULE 11 SANC-
TIONS AND FOR ORDER STRIKING CERTAIN
PORTIONS OF THE SECOND AMENDED COMPLAINT**

[Filed Sept. 17, 1985]

Clerk's Record Docket No. 89

* * * *

8. After defendant Koll had filed this motion to expunge, I learned that in addition to the \$12,595 which is referred to in the Declaration of Herbert F. Kaiser in opposition to defendant City's Rule 11 motion, and which Koll, through its executives and employees, had paid to City officials, the Koll partners who were working on the Pueblo Uno project paid an additional \$15,570 to city officials. Therefore, we have discovered a total thus far of \$28,165 which Koll, its executives and partners on the Pueblo Uno project have paid to such officials, and investigation is continuing. I believe that they did this in order to accomplish their unlawful purpose. I also have discovered that city officials such as Jerry T. Estruth, who City Councilman during the relevant time periods and who voted for the Koll project, has made substantial profits from Redevelopment Agency bonds which, although sold to finance the Koll project, were not needed because private investment would have accomplished the redevelopment. I attach hereto a copy of a memorandum concerning these newly discovered facts as Exhibit E.

* * * *

Exhibit B

2.21.030 Contribution limitations to city council candidates.

No person, other than the candidate in aid of himself, shall make nor shall any person solicit or accept any contribution, gift, subscription, loan, advance, deposit, pledge or promise of money or anything of value in aid of and/or opposition to the nomination or election of a candidate for city council which will cause the total amount contributed by such person to the candidate or any controlled committee of such candidate in a single election to exceed two hundred fifty dollars. Each primary, general or special election is considered separate and distinct for the purposes of this section. (Added by Ord. 20132. Amended by Ords. 20338, 20626.)

2.21.040 Contribution limitations to mayoral candidates.

No person, other than the candidate in aid of himself, shall make nor shall any person solicit or accept any contribution, gift, subscription, loan, advance, deposit, pledge or promise of money or anything of value in aid of and/or opposition to the nomination or election of a candidate for mayor which will cause the total amount contributed by such person to the candidate or any controlled committee of such candidate in a single election to exceed five hundred dollars. Each primary, general or special election is considered separate and distinct for the purposes of this section. (Added by Ord. 20132. Amended by Ords. 20338, 20626.)

* * * *

Exhibit C

The following people are shown on campaign statements as having made contributions to past and present members of the Council while employed with the Koll Company.

1. Drew Gibson, 119 Bryant St., Palo Alto, CA, 94301, (415) 321-5238. Listed as President, Koll Co., Executive, Developer or unknown.
Total Dollar Amount: \$3,950.00.
2. Steven G. Speno, 101 Teresa Ct., Los Gatos, CA, 95030, (408) 356-6886. Listed as Vice President, Koll Co., Executive, Salesman or Developer.
Total Dollar Amount: \$1,245.00.
3. William T. Benson, 13044 Cumberland, Saratoga, CA, 95070, (408) 867-7867. Listed as Vice President, Koll Co., Executive or Developer.
Total Dollar Amount: \$1,820.00.
4. Wendy Bursdall Kurst, 835 Lathrop Dr., Stanford, CA, 94306. Listed as Vice President.
Total Dollar Amount: \$160.00.
5. David Pogue, 1279 Bent Drive, Campbell, CA, 95008. Listed as Vice President.
Total Dollar Amount: \$1,520.00.
6. George B. Roberts, 3795 Ralston, Hillsborough, CA, 94010. Listed as Vice President, Construction.
Total Dollar Amount: \$1,250.00.
7. Robert A. and Eleanor Church, 1342 Robsheal Dr., San Jose, CA. Listed as Vice President, Construction—Northern Division.
Total Dollar Amount: \$550.00.
8. Dianne Perata, 2154 Los Gatos—Almaden, San Jose, CA, 95124. Listed as Office Manager.
Total Dollar Amount: \$500.00.
9. Michael Perata, same as Dianne Perata.
Total Dollar Amount: \$100.00.

10. Charles Steele, 1043 Parkinson, Palo Alto, CA, 94304. Listed as Vice President.

Total Dollar Amount: \$850.00.

11. The Koll Company, 4490 Von Karman Avenue, Newport Beach, CA, 92660, (714) 833-3030.

Total Dollar Amount: \$660.00.

The following San Jose City Council members received contributions from the Koll Co. and its employees:

1. Lu Ryden, Councilwoman, District 1.
4525 Corona Dr., San Jose, CA, 95129, (408) 446-1750.
Occupation: Services of Spouse
Controlled Campaign Committee: Citizens to elect Lou Ryden, address same as residence.
Treasurer: Jerry Slade, 115 Casitas Bulevar, Los Gatos, CA, 95030, (408) 374-4409.

<u>Date</u>	<u>Contributor</u>	<u>Amount</u>
4/28/85	Mr. & Mrs. Drew Gibson	\$125.00 (Encl. A, pg 2)

2. Judy Stabile, Councilwoman, District 2.
275 Omira Dr., San Jose, CA, 95123.
Occupation: Services of Spouse
Controlled Committee: Citizens for Judy Stabile, address same as residence.
Treasurer: Judith Henderson, 1128 Olive Branch Ln., San Jose, CA, 95120.

<u>Date</u>	<u>Contributor</u>	<u>Amount</u>
10/12/84	Steve Speno	\$100.00 (Encl. B, pg 3)

3. Susan Hammer, District 3

1257 W. Hedding St., San Jose, CA, 95126.

Occupation: Attorney, partner in Beauzau, Hammer, Esgar, Bledso and Sprinkle, San Jose, CA.

Controlled Committee: Citizens for Susan Hammer, 615 S. 16th St., San Jose, CA.

Treasurer: Bobbie Fischler, 604 S. 15th St., San Jose, CA, 95112. (see Encl. C—18 pages)

<u>Date</u>	<u>Contributor</u>	<u>Amount</u>
4/12/82	William T. Benson	\$125.00 (Encl C, pg 3)
10/6/82	" "	75.00 (Encl C, pg 9)
6/13/83	" "	100.00 (Encl C, pg 15)
4/4/84	" "	100.00 (Encl C, pg 19)
4/12/84	Robert A. Church	125.00 (Encl C, pg 4)
10/6/82	" "	75.00 (Encl C, pg 10)
4/27/82	Drew G. Gibson	150.00 (Encl C, pg 4)
4/18/84	" "	150.00 (Encl C, pg 17)
4/26/82	David Pogue	125.00 (Encl C, pg 5)
10/6/82	" "	75.00 (Encl C, pg 11)
5/17/82	G. B. Roberts	100.00 (Encl C, pg 6)
10/6/82	" "	150.00 (Encl C, pg 11)
5/17/82	Charles T. Steele	125.00 (Encl C, pg 6)
10/6/82	" "	75.00 (Encl C, pg 12)
6/13/83	Steven Speno	100.00 (Encl C, pg 15)

Total Dollars Received from Koll Co. Employees: \$1,650.00.

4. Shirley Lewis, District 4.

2894 Lausanne Ct., San Jose, CA, 95132.

Occupation: Services of Spouse

Controlled Committee: Friends of Shirley Lewis, address same as residence.

Treasurer: Donna Kouzes, 980 Lakeshire Ct., San Jose, CA, 95126. (see Encl. D—3 pages)

<u>Date</u>	<u>Contributor</u>	<u>Amount</u>
11/3/83	Drew Gibson	\$180.00 (Encl D, pg 3) Food & Wine
11/3/83	Bill Benson	150.00 (Encl D, pg 3) Food & Wine
11/3/83	George Roberts	150.00 (Encl D, pg 3) Food & Wine
TOTAL		\$480.00

These contributions may have been the subject luncheon which was held at the Plateau 7.

5. Blanca Alvarado, District 4.

1411 Sunshadow Ln., San Jose, CA, 95116.

Occupation: Tax Consultant/Preparer

Controlled Committee: Friends of Blanca Alvarado, 650 N. 1st St., San Jose, CA, 95112.

Treasurer: Louis C. Castro, 650 N. 1st St., San Jose, CA, 95112. (see Encl. E—4 pages)

<u>Date</u>	<u>Contributor</u>	<u>Amount</u>
10/18/82	Steven G. Spano	\$100.00 (Encl E, pg 3)
10/18/82	William T. Benson	\$100.00 (Encl E, pg 3)
10/18/82	Robert A. Church	\$100.00 (Encl E, pg 3)
10/18/82	Drew Gibson	\$100.00 (Encl E, pg 3)
10/18/82	G. B. Roberts	\$100.00 (Encl E, pg 3)
10/18/82	Charles T. Steele	\$100.00 (Encl E, pg 4)
10/18/82	David Pogue	\$100.00 (Encl E, pg 4)
TOTAL		\$700.00

Total Dollars Received from Koll Co. Employees: \$700.00

6. Nancy Ianni, District 6

1759 Nomark Ct., San Jose, CA, 95125

Occupation: Services of Spouse

Committee: Citizens for Ianni, P.O. Box 8601, San Jose, CA, 95155.

Treasurer: Kenneth Brady, 1339 Dry Creek Rd., San Jose, CA, 95125. (see Encl. F—3 pages)

<u>Date</u>	<u>Contributor</u>	<u>Amount</u>
6/8/84	Drew Gibson	\$250.00 (Encl. F, pg 3)
Total Dollars Received from Koll Co. Employees: \$250.00.		

7. Patricia Sausedo, District 8.

2911 Queens Est., San Jose, CA, 95135.

Occupation: Services of Spouse

Controlled Committee: Committee to elect Pat Sausedo, same address as residence.

Treasurer: Carmen Nannep, 4347 Partridge Dr., San Jose, CA, 95121. (see Encl. G—17 pages)

<u>Date</u>	<u>Contributor</u>	<u>Amount</u>
10/23/81	Drew Gibson	\$100.00 (Encl G, pg 3)
9/22/82	" "	100.00 (Encl G, pg 6)
9/22/82	William Benson	100.00 (Encl G, pg 5)
3/6/85	The Koll Company	250.00 (Encl G, pg 17)
3/84	William Benson	<u>150.00</u> (Encl G, pg 14)

TOTAL \$700.00

Total Dollars Received from Koll Co. Employees: \$700.00

8. James T. Beall, District 9

1492 Kimberly Ct., San Jose, CA, (408) 269-7445.

Occupation: None listed.

Controlled Committee: Citizens for Jim Beall, 5506 Rudy Dr., San Jose, CA, 95124.

Treasurer: Madeleine Bunker, address same as committee's.
(see Encl. H—20 -pages)

<u>Date</u>	<u>Contributor</u>	<u>Amount</u>
2/1/80	Drew G. Gibson	\$ 15.00 (Encl H, pg 3)
4/9/80	" "	100.00 (Encl H, pg 3)
7-9/80	" "	200.00 (Encl H, pg 6)
7/3/81	" "	150.00 (Encl H, pg 9)
5/20/82	" "	150.00 (Encl H, pg 12)
9/12/84	" "	250.00 (Encl H, pg 15)
4/10/80	David Pogue	100.00 (Encl H, pg 3)
7/3/81	" "	100.00 (Encl H, pg 9)
5/20/82	" "	100.00 (Encl H, pg 12)
9/12/84	" "	250.00 (Encl H, pg 17)
7-9/80	Charles Steele	100.00 (Encl H, pg 6)
5/20/82	" "	100.00 (Encl H, pg 12)
7/3/81	Michael A. Perata	100.00 (Encl H, pg 8)
5/20/82	William T. Benson	100.00 (Encl H, pg 12)
9/6/84	Steven Speno	250.00 (Encl H, pg 16)
9/12/84	George Roberts	250.00 (Encl H, pg 17)
TOTAL		\$2,315.00

Total Dollars Received from Koll Co. Employees: \$2,315.00.

9. Thomas A. McEnery, Mayor

44 Ayer Ave., San Jose, CA, 95113.

Occupation: None listed, extensive investment portfolio.

Controlled Committee: Citizens for Tom McEnery, 84 W. Santa Clara, #590, San Jose, CA, 95113

Treasurer: Patrick J. O'Brien, same address as committee.
(see Encl. I—32 pages)

<u>Date</u>	<u>Contributor</u>	<u>Amount</u>
10/28/81	William T. Benson	\$ 100.00 (Encl I, pg 3)
3/29/82	" "	250.00 (Encl I, pg 15)
6/14/85	" "	320.00 (Encl I, pg 30)
10/22/81	Robert Church	100.00 (Encl I, pg 4)
5/13/82	" "	150.00 (Encl I, pg 16)
10/21/81	Drew Gibson	100.00 (Encl I, pg 5)
3/17/82	" "	250.00 (Encl I, pg 11)
1-5/83	" "	250.00 (Encl I, pg 23)
6/14/85	" "	320.00 (Encl I, pg 30)
10/29/81	David Pogue	100.00 (Encl I, pg 6)
3/29/82	" "	250.00 (Encl I, pg 15)
6/14/85	" "	320.00 (Encl I, pg 31)
10/28/81	George Roberts	100.00 (Encl I, pg 7)
5/13/82	" "	250.00 (Encl I, pg 17)
3-6/84	" "	150.00 (Encl I, pg 12)
3/17/82	Dianne Parata	250.00 (Encl I, pg 11)
3/17/82	Charles Steele	250.00 (Encl I, pg 12)
3/18/82	Steven Speno	125.00 (Encl I, pg 19)
6/14/85	" "	320.00 (Encl I, pg 32)
6/14/85	The Koll Company	160.00 (Encl I, pg 27)
6/14/85	Wendy Burdsall Kirst	160.00 (Encl I, pg 30)
	TOTAL	\$4,275.00

Total Dollars Received from Koll Co. Employees: \$4,275.00

Former Council members who recently exited office and accepted contributions from employees of the Koll Co.:

1. Claude Fletcher, former mayor and council member, District 10. 6090 Montoro Dr., San Jose, CA.

Occupation: None listed, extensive investment portfolio.

Committee: Fletcher Committee, same address as residence.

Treasurer: Joseph Sandoval, C.P.A., 366 E. Hamilton Ave., Campbell, CA, 95008.

(see Encl. J—14 pages)

<u>Date</u>	<u>Contributor</u>	<u>Amount</u>
4/15/82	Drew Gibson	\$ 150.00 (Encl J, pg 4)
5/13/82	" "	100.00 (Encl J, pg 4)
6/16/84	" "	250.00 (Encl J, pg 8)
4/14/85	" "	250.00 (Encl J, pg 14)
4/12/82	William T. Benson	150.00 (Encl J, pg 3)
6/14/84	Steven Speno	250.00 (Encl J, pg 7)
5/14/82	Dianne Perata	250.00 (Encl J, pg 9)
5/14/82	Charles Steele	100.00 (Encl J, pg 10)
5/14/85	The Koll Co.	250.00 (Encl J, pg 13)

Total Dollars Received from Koll Co. Employees: \$1,750.00.

2. Jerry T. Estruth, former council member, District 2.

P.O. Box 2347, San Jose, CA, 95109.

Left office November, 1983.

Occupation: None listed, extensive investment portfolio.

Controlled Committee: Estruth for San Jose!, same address as residence.

Treasurer: Kathy A. Ebright, 1863 Crewe Ct., San Jose, CA, 95132.

(see Encl. K—3 pages)

<u>Date</u>	<u>Contributor</u>	<u>Amount</u>
7/8/80	Drew Gibson	\$ 250.00 (Encl K, pg 3)
7/10/80	William T. Benson	100.00 (Encl K, pg 3)

Total Dollars Received from Koll Co. Employees: \$350.00.

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According to Mayor McEnery's secretary, Sylvia, Steven G. Speno worked for council member Lawrence Pegram, who held a council seat from 1975 to 1980. We were unable to locate any records to verify this information.

Investigation is continuing.

/s/ HAROLD K. LIPSET
Harold K. Lipset

HKL/djg
Enclosures (11)

Appendix K

Herbert F. Kaiser, Esq.
Attorney at Law
Suite 1250—Alcoa Building
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 392-2255
Attorney for Plaintiffs

United States District Court
Northern District of California
CASE NO. C-84-20772 WAI
Docket #106

Date: November 21, 1985

Time: 9:00 a.m.

Dept: Honorable William A. Ingram

David A. Boone and Stephen P. Fox, individually and as
general partners of DSC-3 Group, a California Limited
Partnership, as general partners of Market/Post, Ltd., a
California Limited Partnership; Dave Goglio and Donald
Goglio, individually and as general partners of Three G's, a
California Limited Partnership,
Plaintiffs,

vs.

Redevelopment Agency of the City of San Jose, a Public Body
Corporate and Politic of the State of California; City of San
Jose, a municipal corporation and subdivision of the State of
California; Frank Taylor; The Koll Company, a California
Corporation,
Defendants.

**DECLARATION OF PLAINTIFF DAVID A. BOONE IN
OPPOSITION TO MOTION TO EXPUNGE LIS
PENDENS AND REQUEST FOR ATTORNEY'S FEES
[Filed Nov. 7, 1985]**

Clerk's Record Docket No. 106

I, David Boone, hereby declare under penalty of perjury that I
am one of the plaintiffs in this action, and that if called as a

witness, I could competently, accurately and truthfully testify of my own knowledge to the following:

8. After defendant Koll had filed this motion to expunge, I learned that in addition to the \$12,595 which is referred to in the Declaration of Herbert F. Kaiser in opposition to defendant City's Rule 11 motion, and which Koll, through its executives and employees, had paid to City officials, the Koll partners who were working on the Pueblo Uno project paid an additional \$15,570 to city officials. Therefore, we have discovered a total thus far of \$28,165 which Koll, its executives and partners on the Pueblo Uno project have paid to such officials, and investigation is continuing. I believe that they did this in order to accomplish their unlawful purpose. I also have discovered that city officials such as Jerry T. Estruth, who was City Councilman during the relevant time periods and who voted for the Koll project, has made substantial profits from Redevelopment Agency bonds which, although sold to finance the Koll project, were not needed because private investment would have accomplished the redevelopment. I attach hereto a copy of a memorandum concerning these newly discovered facts as Exhibit E.

Exhibit B

Downtown San Jose
1995

Final Environmental Impact Report
April, 1983
City of San Jose
Department of City Planning

Projects entirely or partially within the Core Area, and three proposed (Survey) areas. They do not, however, constitute all of the study area. The entire City is divided into Traffic Analysis Zones (TAZ's) which are used in assessing traffic impacts for the General Plan and for the City's Transportation Model. The TAZ's are smaller than census tracts; for the Downtown Core Area, most TAZ's are only one or two blocks in size (Figure 4). It is, therefore, convenient to use the TAZ grid as an easy coordinate system when discussing the Downtown.

Redevelopment

As mentioned earlier, an important part of the project is the Redevelopment Project Areas (Figure 6). Park Center Plaza and San Antonio Plaza are the City's oldest redevelopment projects and represent the greatest degree of public involvement and investment to date. Park Center Plaza is almost completely developed, although some limited additional office and parking construction may still occur.

San Antonio Plaza is still largely undeveloped and contains primarily vacant land. New State and Federal buildings are under construction at this time. In addition, developers have been designated for extensive new office, hotel, *retail* and residential projects within San Antonio. The analysis in this EIR assumes buildout of San Antonio Plaza. The environmental effects identified in the recent EIR/EIS done for San Antonio Plaza are considered as part of the background (approved) data against which further development Downtown was assessed.

Pueblo Uno is experiencing a great deal of development interest and activity at the present time and, despite its small size, is

expected to contribute significantly to the future construction activity.

Julian-Stockton, of which only a small part is in the Core Area, is primarily industrial in existing and planned uses. Very little new activity has taken place in Julian-Stockton other than expansion of FMC. The Redevelopment Agency is presently re-evaluating the area to identify a development strategy for encouraging further upgrading or redevelopment.

As shown in the 1995 Strategy Plan, two of the survey areas (1 & 2) are anticipated to contain almost entirely privately developed and redeveloped projects. Survey Area #1 will contain new high rise office buildings with some commercial uses. High density residential will be encouraged in its easterly block. Survey Area #2 is shown on both the General Plan and the 1995 Strategy Plan as more residential in nature. Both high and low rise commercial/office structures should develop between Market and Second Streets, but residential redevelopment is expected to predominate between Second and Fourth Streets.

The newly designated Guadalupe-Auzerais *Survey Area is planned to* include several major public projects. A new convention center complex of over 300,000 square feet and a library addition are planned on the south side of San Carlos Street. The convention center will be complemented by two planned hotels and a major office development on the same * * *

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Exhibit E

KOLL

Gibson G. Jr.	McEnery	100.00	10/21/81
		250.00	03/17/82
		150.00	05/21/83
		100.00	05/21/83
		500.00	03/19/84
		320.00	06/14/85
Gibson G. Jr.	Alvarado	100.00	10/18/82
Gibson G. Jr.	Beal	15.00	02/01/80
		100.00	04/09/80
		200.00	09/23/80
		150.00	07/03/81
		150.00	05/20/82
		250.00	09/12/84
Gibson G. Jr.	Estruth	250.00	07/08/80
Gibson G. Jr.	Fletcher	150.00	04/15/82
		100.00	05/13/82
		250.00	06/16/84
		250.00	04/14/85
Gibson G. Jr.	Hammer	150.00	04/27/82
		150.00	04/18/84
Gibson G. Jr.	Ianni	250.00	06/08/84
Gibson G. Jr.	Lewis	180.00	11/03/83
Gibson G. Jr.	Ryden	125.00	04/28/85
Gibson G. Jr.	Sausedo	100.00	10/23/81
		100.00	09/22/82
		100.00	08/03/83
	Subtotal	4,540.00	
Benson W.T.	McEnery	50.00	03/05/80
		100.00	10/28/81
		250.00	03/29/82
		250.00	05/21/83
		150.00	03/19/84
		320.00	06/14/85
Benson W.T.	Alvarado	100.00	10/18/82
Benson W.T.	Beal	100.00	05/20/82
		250.00	09/12/84
Benson W.T.	Estruth	100.00	07/10/80
Benson W.T.	Fletcher	150.00	04/12/82
Benson W.T.	Hammer	125.00	04/12/82
		75.000	10/06/82
		100.00	06/13/83
		100.00	04/04/84

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Benson W.T.	Lewis	95.00	10/31/80
		150.00	11/03/83
Benson W.T.	Ryden	125.00	04/28/85
Benson W.T.	Sausedo	100.00	09/22/82
		150.00	03/00/84
	Subtotal	2,840.00	
Roberts G.B.	McEnery	50.00	03/05/80
		100.00	10/28/81
		250.00	05/13/82
		500.00	05/19/84
Roberts G.B.	Alvarado	100.00	10/18/82
Roberts G.B.	Beal	250.00	09/12/84
Roberts G.B.	Hammer	100.00	05/17/82
		150.00	10/06/82
Roberts G.B.	Lewis	150.00	11/03/83
Roberts G.B.	Lewis	150.00	11/03/83
Roberts G.B.	Sausedo	100.00	09/22/82
	Subtotal	1,900.00	
Pogue, D.L.	MCEnergy	50.00	03/05/80
		100.00	10/28/81
		250.00	03/29/82
		250.00	05/21/83
		320.00	06/14/85
Pogue D.L.	Alvarado	100.00	10/18/82
Pogue D.L.	Beal	100.00	04/10/80
		100.00	07/03/81
		100.00	05/02/82
		250.00	09/12/84
Pogue D.L.	Fletcher	250.00	04/14/85
Pogue D.L.	Hammer	125.00	04/26/82
		75.00	10/06/82
Pogue D.L.	Sausedo	100.00	09/22/82
		150.00	03/00/84
	Subtotal	2,320.00	
Kirst W.B.	McEnery	160.00	06/14/85
	Subtotal	160.00	
Koll Company	McEnery	200.00	03/04/80
		160.00	06/14/85
Koll Company	Estruth	325.00	05/29/79
Koll Company	Fletcher	250.00	05/14/82
		250.00	05/14/85
Koll Company	Putman	100.00	11/19/84
Koll Company	Sausedo	250.00	06/80/85
	Subtotal	1,535.00	

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Speno S.G.	McEnery		100.00	03/04/80
			125.00	03/18/82
			250.00	05/21/83
			320.00	06/14/85
Speno S.G.	Alvarado		100.00	10/18/82
Speno S.G.	Beal		250.00	09/06/84
Speno S.G.	Fletcher		250.00	06/14/84
Speno S.G.	Hammer		100.00	06/13/83
Speno S.G.	Sausedo		100.00	06/02/83
			50.00	09/22/82
Speno S.G.	Stabile		100.00	10/12/84
	Subtotal	1,745.00		
Church Robert & Eleanor	McEnery		50.00	03/06/80
			100.00	10/22/81
			150.00	05/13/82
Church Robert & Eleanor	Alvarado		100.00	10/18/82
Church Robert & Eleanor	Hammer		125.00	04/12/82
			75.00	10/06/82
Church Robert & Eleanor	Sausedo		100.00	10/23/81
		Subtotal	700.00	
Perata Dianne	McEnery		250.00	03/17/82
Perata Michael	Beal		100.00	07/03/81
Perata Dianne	Fletcher		250.00	05/14/82
	Subtotal	600.00		
Steele Charles	McEnery		50.00	03/06/80
			250.00	03/17/82
			250.00	05/21/83
Steele Charles	Alvarado		100.00	10/18/82
Steele Charles	Beal		100.00	09/23/80
			100.00	05/20/82
Steele Charles	Fletcher		100.00	05/14/82
Steele Charles	Hammer		125.00	05/17/82
			75.00	10/06/82
Steele Charles	Lewis		95.00	10/31/80
Steele Charles	Sausedo		100.00	09/22/82
	Subtotal	1,345.00		
	Total	17,685.00		

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Nolte-Market Street

Nolte G.S. JR.	McEnergy	200.00	09/19/79
		100.00	02/26/80
		1,250.00	03/19/83
		500.00	03/12/84
		320.00	06/14/85
Nolte G.S. Jr.	Estruth	150.00	03/26/81
Nolte G.S. Jr.	Fletcher	225.00	03/30/82
		100.00	06/11/84
Nolte G.S. Jr.	Ianni	100.00	03/09/84
Nolte G.S. Jr.	Lewis	100.00	03/25/81
		250.00	10/05/83
		180.00	03/07/85
Nolte G.S. Jr.	Putnam	100.00	06/02/84
Nolte G.S. Jr.	Sausedo	200.00	05/24/83
Nolte G.S. Jr.	Stabile	200.00	10/02/84
	Subtotal	3,975.00	
Bryer R.L.	Estruth	300.00	03/23/81
Bryer R.L.	Lewis	100.00	01/15/84
	Subtotal	400.00	
	Total	4,375.00	

Westwood Company-Market Street

Westwood Company	McEnergy	500.00	05/10/84
		Subtotal	500.00
Morici Anthony C. Trustee	McEnergy	500.00	02/25/80
		500.00	09/17/81
		250.00	05/10/84
Morici Anthony C. Trustee	Lewis	125.00	09/16/83
		100.00	04/12/84
		Subtotal	1,475.00
Marino Marianne Trustee	McEnergy	100.00	09/17/81
		250.00	05/10/84
		Subtotal	350.00
McNamef Carol Trustee	Ryden	100.00	05/10/82
		Subtotal	100.00
Hallgrimson S.L.	McEnergy	100.00	09/27/81
		500.00	05/21/83
Hallgrimson S.L.	Estruth	500.00	05/01/79
Hallgrimson S.L.	Hammer	150.00	05/17/82
Hallgrimson S.L.	Sausedo	250.00	04/00/84

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Subtotal 1,500.00

McCarthy J.A.
(McCarthy Gertrude
1117 Rankin Ave.
S.J.)

McEnergy 100.00 12/31/81
Subtotal 100.00

The Westwood II

McEnergy 300.00 09/17/81
Subtotal 300.00
Total 4,325.00

HFJA-Pueblo Uno

Danner A.E.

Hammer 200.00 06/03/82
80.00 09/24/82
100.00 03/15/84

Subtotal 380.00

Elfving W.J.

McEnergy 50.00 08/29/79

Elfving W.J.

Hammer 50.00 08/16/82

100.00 02/29/84

Elfving W.J.

Hammer 50.00 08/16/82

100.00 02/29/84

Subtotal 350.00

Whyte R.M.

McEnergy 50.00 05/21/83

500.00 03/19/83

500.00 03/19/84

Subtotal 1,050.00

Total 1,780.00

Grand Total 28,165.00

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McEnery

The Westwood II has the same address as A.C. Morici in the Westwood Co. Robert M. Tobin Atr. with HFJA donated \$500.00 on 02/21/80 Barry Trailer Eng. for Nolte donated \$100.00 on 03/07/80R Henry Aiassa Properties \$125.00 05/21/83, \$320.00 on 05/30/85 same Aiassa family

Blanca Alvarado

Alverado Tax Service changed on April 1984 report to Alverado Consultant Service and now deals in real estate also

James Beal

(Young R. Investor land use consultant service <1000.00 >10000.00 fee) 02/09/81 04/01/82 acquired Bank of America stock 4/14/84 >1000.00 & <10000.00 disposed of on 6/4/84

Jerry T. Estruth

Obtained San Jose Redevelopment Agency Bonds 4/83 >\$1000.00 but <\$10,000.00 sold 6/84.

Claude Fletcher

Westwood Company-Market Street
W.R. Costello Co. donated \$100.00 on 06/16/84 is it related to Costello W.C. 3/30/84 721 statement indicates that he was salaried by Pacific Telephone to do telephone system sales income >\$10,000.00.

Hammer

Koll

Laguna Street Inc. donated \$250.00 on 09/22/82 are they the same as Laguna Avenue Assoc.

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Lewis

Westwood Company-Market Street
O'Brien, Offereins, & Hallgrimson donated \$250.00 on 9/16/83

Putnam

Westwood Company-Market Street
O'Brien, Offereins, & Hallgrimson donated \$250.00 on 6/3/84

Patricia Sausedo

Westwood Company-Market Street
Maurice Abraham Eng. for Nolte \$250.00 on 3/9/84

Appendix L

Addendum of Statutes

15 U.S.C.A. § 1

Trusts, etc., in restraint of trade illegal; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647 § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282; Dec. 21, 1974, Pub. L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub. L. 94-145, § 2, 89 Stat. 801.

15 U.S.C.A. § 2

Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282; Dec. 21, 1974, Pub. L. 93-528, § 3, 88 Stat. 1708.

42 U.S.C.A. § 1983

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

§ 35. Recovery of damages, etc., for antitrust violations from any local government, or official or employee thereof acting in an official capacity

(a) Prohibition in general

No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c of this title from any local government, or official or employee thereof acting in an official capacity.

(b) Preconditions for attachment of prohibition; prima facie evidence for nonapplication of prohibition

Subsection (a) of this section shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) of this section shall not apply.

(Pub. L. 98-544 § 3, Oct. 24, 1984, 98 Stat. 2750.)

U.S. CONSTITUTION, 14th AMENDMENT
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 33032. Factors indicating economic dislocation, deterioration, or disuse

A blighted area is characterized by properties which suffer from economic dislocation, deterioration, or disuse because of one or more of the following factors which cause a reduction of, or lack of, proper utilization of the area to such an extent that it constitutes a serious physical, social, or economic burden on the community which cannot reasonably be expected to be reversed or alleviated by private enterprise acting alone:

(a) The subdividing and sale of lots of irregular form and shape and inadequate size for proper usefulness and development.

(b) The laying out of lots in disregard of the contours and other topography or physical characteristics of the ground and surrounding conditions.

(c) The existence of inadequate public improvements, public facilities, open spaces, and utilities which cannot be remedied by private or governmental action without redevelopment.

(d) A prevalence of depreciated values, impaired investments, and social and economic maladjustment.

(e) The existence within the Lake Tahoe basin of substandard public or private facilities and improvements, insufficient open space, or water quality protection systems which do not comply with the environmental threshold carrying capacities established by the Tahoe Regional Planning Agency and the regional plan in

accordance with the Tahoe Regional Planning Compact set forth in Section 66801 of the Government Code.

§ 33035. Public injury from blighted area

It is further found and declared that:

(a) The existence of blighted areas characterized by any or all of such conditions constitutes a serious and growing menace which is condemned as injurious and inimical to the public health, safety, and welfare of the people of the communities in which they exist and of the people of the State.

(b) Such blighted areas present difficulties and handicaps which are beyond remedy and control solely by regulatory processes in the exercise of police power.

(c) They contribute substantially and increasingly to the problems of, and necessitate excessive and disproportionate expenditures for, crime prevention, correction, prosecution, and punishment, the treatment of juvenile delinquency, the preservation of the public health and safety, and the maintaining of adequate police, fire, and accident protection and other public services and facilities.

(d) This menace is becoming increasingly direct and substantial in its significance and effect.

(e) The benefits which will result from the remedying of such conditions and the redevelopment of blighted areas will accrue to all the inhabitants and property owners of the communities in which they exist.

(Added by Stats. 1963, c. 1812, p. 3680, § 3.)

§ 33037. Appropriate means of redevelopment; Eminent domain; Expenditure of public money

For these reasons it is declared to be the policy of the State:

(a) To protect and promote the sound development and redevelopment of blighted areas and the general welfare of the inhabitants of the communities in which they exist by remedying such injurious conditions through the employment of all appropriate means.

(b) That whenever the redevelopment of blighted areas cannot be accomplished by private enterprise alone, without public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, in the work of clearance, and in the making of improvements necessary therefor, it is in the public interest to employ the power of eminent domain, to advance or expend public funds for these purposes, and to provide a means by which blighted areas may be redeveloped or rehabilitated.

(c) That the redevelopment of blighted areas and the provisions for appropriate continuing land use and construction policies in them constitute public uses and purposes for which public money may be advanced or expended and private property acquired, and are governmental functions of state concern in the interest of health, safety, and welfare of the people of the State and of the communities in which the areas exist.

(d) That the necessity in the public interest for the provisions of this part is declared to be a matter of legislative determination.

Added Stats 1963 ch 1812 § 3.

§ 33131. Plans; dissemination of information; applications for federal programs and grants

An agency may:

(a) From time to time prepare and carry out plans for the improvement, rehabilitation, and redevelopment of blighted areas.

(b) Disseminate redevelopment information.

(c) Prepare applications for various federal programs and grants relating to housing and community development and plan and carry out such programs within authority otherwise granted by this part, at the request of the legislative body.

(Added by Stats. 1963, c. 1812, p. 3685, § 3. Amended by Stats. 1969, c. 1561, p. 3167, § 1.)

§ 33220. Powers of public bodies

For the purpose of aiding and co-operating in the planning, undertaking construction or operation of redevelopment projects

located within the area in which it is authorized to act, any public body, upon the terms and with or without consideration as it determines, may:

(a) Dedicate, sell, convey, or lease any of its property to a redevelopment agency.

(b) Cause parks, playgrounds, recreational, community, educational, water, sewer or drainage facilities, or any other works which it is otherwise empowered to undertake, to be furnished adjacent to or in connection with redevelopment projects.

(c) Furnish, dedicate, close, vacate, pave, install, grade, re-grade, plan, or replan streets, roads, roadways, alleys, sidewalks, or other places which it is otherwise empowered to undertake.

(d) Plan or replan, zone or rezone any part of such area and make any legal exceptions from building regulations and ordinances.

(e) Enter into agreements with the federal government, an agency, or any other public body respecting action to be taken pursuant to any of the powers granted by this part or any other law; such agreements may extend over any period, notwithstanding any law to the contrary.

(f) Purchase or legally invest in any of the bonds of an agency and exercise all of the rights of any holder of such bonds.

(g) Purchase and buy or otherwise acquire land in a project area from an agency for redevelopment in accordance with the plan, and in connection therewith, is hereby authorized to become obligated in accordance with Section 33437 except that subdivision (b) of Section 33437 shall apply to a public body only to the extent that it is authorized (and funds have been made available) to make the redevelopment improvements or structures required.

(Added by Stats. 1963, c. 1812, p. 3687, § 3.)

§ 33341. Bonds; expenditure of proceeds; repayment

Redevelopment plans may provide for the agency to issue bonds and expend the proceeds from their sale in carrying out the redevelopment plan. If such an issuance is provided for, the redevelopment plan shall also contain adequate provision for the

payment of principal and interest when they become due and payable.

(Added by Stats. 1963, c. 1812, p. 3691, § 3.)

§ 33342. Acquisition of real property

Redevelopment plans may provide for the agency to acquire by gift, purchase, lease, or condemnation all or part of the real property in the project area.

(Added by Stats. 1963, c. 1812, p. 3691, § 3.)

§ 33352. Report accompanying redevelopment plan; Contents

Every redevelopment plan submitted by the agency to the legislative body shall be accompanied by a report containing all of the following:

(a) The reasons for the selection of the project area, a description of the specific projects then proposed by the agency, a description of how these projects will improve or alleviate the conditions described in subdivision (b), and, if public improvements are to be made by the agency, an explanation of why the public improvements cannot be reasonably expected to be accomplished by private enterprise acting alone.

(b) A description of the physical, social, and economic conditions existing in the area.

(c) The proposed method of financing the redevelopment of the project area in sufficient detail so that the legislative body may determine the economic feasibility of the plan.

(d) A method or plan for the relocation of families and persons to be temporarily or permanently displaced from housing facilities in the project area, which method or plan shall include the provision required by Section 33411.1 that no persons or families of low and moderate income shall be displaced unless and until there is a suitable housing unit available and ready for occupancy by the displaced person or family at rents comparable to those at the time of their displacement.

(e) An analysis of the preliminary plan.

(f) The report and recommendations of the planning commission.

(g) The summary referred to in Section 33387.

(h) The report required by Section 65402 of the Government Code.

(i) The report required by Section 21151 of the Public Resources Code.

(j) The report of the county fiscal officer as required by Section 33328.

(k) The report of the fiscal review committee, if any.

(l) If the project area contains low- or moderate-income housing, a neighborhood impact report which describes in detail the impact of the project upon the residents of the project area and the surrounding areas, in terms of relocation, traffic circulation, environmental quality, availability of community facilities and services, effect on school population and quality of education, property assessments and taxes, and other matters affecting the physical and social quality of the neighborhood. The neighborhood impact report shall also include all of the following:

(1) The number of dwelling units housing persons and families of low or moderate income expected to be destroyed or removed from the low- and moderate-income housing market as part of a redevelopment project.

(2) The number of persons and families of low or moderate income expected to be displaced by the project.

(3) The general location of housing to be rehabilitated, developed, or constructed pursuant to Section 33413.

(4) The number of dwelling units housing persons and families of low or moderate income planned for construction or rehabilitation, other than replacement housing.

(5) The projected means of financing the proposed dwelling units for housing persons and families of low and moderate income planned for construction or rehabilitation.

(6) A projected timetable for meeting the plan's relocation, rehabilitation, and replacement housing objectives.

(m) An analysis by the agency of the report submitted by the county as required by Section 33328, which shall include a summary of the consultation of the agency, or attempts to consult by the agency, with each of the taxing agencies as required by Section 33328; and an analysis by the agency of the report of the fiscal review committee, if any, which shall include the agency's response to the report of the fiscal review committee, additional information, if any, and, at the discretion of the agency, proposed mitigation measures.

Added Stats 1963 ch 1812 § 3; Amended Stats 1965 ch 1665 § 24; Stats 1972 ch 324 § 1; Stats 1976 ch 1337 § 9; Stats 1978 ch 854 § 1; Stats 1984 ch 147 § 6.

§ 33433. Approval by legislative body as to sale or lease of property acquired with tax increments; Hearing; Application to sale or lease of small housing project

(a) Except as provided in subdivision (c), before any property of the agency acquired in whole or in part, directly or indirectly, with tax increment moneys is sold or leased for development pursuant to the redevelopment plan, the sale or lease shall first be approved by the legislative body after public hearing. Notice of the time and place of the hearing shall be published in a newspaper of general circulation in the community for at least two successive weeks prior to the hearing.

The agency shall make available for public inspection and copying at a cost not to exceed the cost of duplication:

(1) A copy of the proposed sale or lease.

(2) A summary which describes and specifies all of the following:

(A) The cost of the agreement to the agency, including land acquisition costs, clearance costs, relocation costs, the costs of any improvements to be provided by the agency, plus the expected interest on any loans or bonds to finance the agreements.

(B) The estimated value of the interest to be conveyed or leased, determined at the highest uses permitted under the plan.

(C) The purchase price or sum of the lease payments which the lessor will be required to make during the term of the lease. If the sale price or total rental amount is less than the fair market value of the interest to be conveyed or leased, determined at the highest and best use consistent with the redevelopment plan, then the agency shall provide as part of the summary an explanation of the reasons for the difference.

(b) The report shall be made available to the public no later than the time of publication of the first notice of the hearing mandated by this section. The resolution approving the lease or sale shall be adopted by a majority vote unless the legislative body has provided by ordinance for a two-thirds vote for that purpose and shall contain findings that the consideration is not less than fair market value in accordance with covenants and conditions governing the sale or lease or, with respect to any sale or lease at less than estimated value, determined at the highest use permitted under the plan, that the lesser consideration is necessary to effectuate the purposes of the plan.

(c) At the election of the legislative body, subdivisions (a) and (b) shall not apply to the sale or lease of a small housing project, as defined by Section 33013. If the legislative body so elects, the agency shall, instead, hold a public hearing in conformity with the requirements of subdivision (a) and shall also report the sale or lease to the legislative body on or before 30 days after the end of the agency's fiscal year during which the sale or lease occurred. The report shall disclose the name of the buyer, the legal description or street address of the property, the date of the sale or lease, the consideration for which the property was sold or leased by the agency to the buyer or lessee, and the date on which the agency held its public hearing for the sale or lease pursuant to Section 33431.

As used in this subdivision and Section 33413, "persons and families of low or moderate income" has the same meaning as defined by Section 50093.

Amended Stats 1987 ch 935 § 2.

§ 33450. Authority to amend; recommendation

If at any time after the adoption of a redevelopment plan for a project area by the legislative body, it becomes necessary or desirable to amend or modify such plan, the legislative body may by ordinance amend such plan upon the recommendation of the agency. The agency recommendation to amend or modify a redevelopment plan may include a change in the boundaries of the project area to add land to or exclude land from the project area. Except as otherwise provided in Section 33378, the ordinance shall be subject to referendum as prescribed by law for the ordinances of the legislative body.

(Amended by Stats.1977, c. 797, p. 2446, § 11.)

§ 56035. Notice to property owners and public entities

(a) In addition to the notice required pursuant to Section 56034, the legislative body shall provide notice of the hearing and proposed plan to all persons, including businesses, corporations, or other public or private entities, shown on the last equalized assessment roll as owning real property within 300 feet of the property which is included within the plans and to each city, county, or city and county contiguous to the proposed site.

(b) The notice required by this section shall be given by at least one of the following methods:

(1) Direct mailing to the owners.

(2) Posting of notice by the legislative body on and off the site in the area where the large scale urban development is to be located.

(3) Delivery of notice by any means other than mail to the owners.

(4) Any other method reasonably calculated by the legislative body to provide actual notice of the hearing.

(5) Nothing in this section shall preclude the legislative body from providing additional notice by other means.

Added Stats 1982 ch 1228 § 1.

§ 56040. Designation of lead agency; Certification of environmental impact report; When subsequent or supplemental report required

The legislative body is hereby designated the lead agency and shall certify an environmental impact report in accordance with the provisions of the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) prior to approving a large scale urban development. When an environmental impact report has been certified for a large scale urban development pursuant to this section, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency unless one or more of the following events occur:

(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.

(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions of the environmental impact report.

(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available. No person shall have standing to bring an action or proceeding to attack, review, set aside, void, or annul a finding of a legislative body made at a public hearing pursuant to this section unless he or she has participated in that public body failed to give notice of the public hearing as required by law. For purposes of this provision, a person has participated in the public hearing if he or she has submitted either oral or written testimony regarding the proposed determination, finding, or decision prior to the close of the hearing.

Added Stats 1982 ch 1228 § 1

§ 6. Public credit and gifts; Subscriptions of corporate stock; Temporary transfer of local funds

The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be

hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI; and it shall not have power to authorize the State, or any political subdivision thereof, to subscribe for stock, or to become a stockholder in any corporation whatever; provided, further, that irrigation district for the purpose of acquiring the control of any entire international water system necessary for its use and purposes, a part of which is situated in the United States, and a part thereof in a foreign country, may in the manner authorized by law, acquire the stock of any foreign corporation which is the owner of, or which holds the title to the part of such system situated in a foreign country; provided, further, that irrigation districts for the purpose of acquiring water and water rights and other property necessary for their uses and purposes, may acquire and hold the stock of corporations, domestic or foreign, owning waters, water rights, canals, waterworks, franchises or concessions subject to the same obligations and liabilities as are imposed by law upon all other stockholders in such corporation; and

Provided, further, that this section shall not prohibit any county, city and county, city, township, or other political corporation or subdivision of the State from joining with other such agencies in providing for the payment of workers' compensation, unemployment compensation, tort liability, or public liability losses incurred by such agencies, by entry into an insurance pooling arrangement under a joint exercise of powers agreement, or by membership in such publicly-owned nonprofit corporation or other public agency as may be authorized by the Legislature; and

Provided, further, that nothing contained in this Constitution shall prohibit the use of State money or credit, in aiding veterans who served in the military or naval service of the United States during the time of war, in the acquisition of, or payments for, (1)

farms or homes, or in projects of land settlement or in the development of such farms or homes or land settlement projects for the benefit of such veterans, or (2) any business, land or any interest therein, building, supplies, equipment, machinery, or tools, to be used by the veteran in pursuing a gainful occupation; and

Provided, further, that nothing contained in this Constitution shall prohibit the State, or any county, city and county, city, township, or other political corporation or subdivision of the State from providing aid or assistance to persons, if found to be in the public interest, for the purpose of clearing debris, natural materials, and wreckage from privately owned lands and waters deposited thereon or therein during a period of a major disaster or emergency, in either case declared by the President. In such case, the public entity shall be indemnified by the recipient from the award of any claim against the public entity arising from the rendering of such aid or assistance. Such aid or assistance must be eligible for federal reimbursement for the cost thereof.

And Provided, still further, that notwithstanding the restrictions contained in this Constitution, the treasurer of any city, county, or city and county shall have power and the duty to make such temporary transfers from the funds in custody as may be necessary to provide funds for meeting the obligations incurred for maintenance purposes by any city, county, city and county, district, or other political subdivision whose funds are in custody and are paid out solely through the treasurer's office. Such temporary transfer of funds to any political subdivision shall be made only upon resolution adopted by the governing body of the city, county, or city and county directing the treasurer of such city, county, or city and county to make such temporary transfer. Such temporary transfer of funds to any political subdivision shall not exceed 85 percent of the anticipated revenues accruing to such political subdivision, shall not be made prior to the first day of the fiscal year not after the last Monday in April of the current fiscal year, and shall be replaced from the revenues accruing to such political subdivision before any other obligation of such political subdivision is met from such revenue.

§ 33500. Time to bring action attacking redevelopment plan

No action attacking or otherwise questioning the validity of any redevelopment plan, or amendment to a redevelopment plan, or the adoption or approval of such plan, or amendment, or any of the findings or determinations of the agency or the legislative body in connection with such plan shall be brought prior to the adoption of the redevelopment plan nor at any time after the elapse of 60 days from and after the date of adoption of the ordinance adopting or amending the plan.

The amendments made to this section at the 1977-78 Regular Session of the Legislature do not represent a change in, but are declaratory of, existing law.

Added Stats 1963 ch 1812 § 3; Amended Stats 1977 ch 797 § 13.



(3)
No. 87-2086

Supreme Court, U.S.
FILED

SEP 28 1988

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

DAVID A. BOONE, et. al.,
Petitioners,

VS.

REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE, et al.,
Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS

HERBERT F. KAISER*
The Alcoa Building, Suite 1600
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 392-1184
Attorney for Petitioners
David A. Boone, et al.

* Counsel of Record

REASON FOR SUPPLEMENTAL BRIEF

Petitioners Supplemental Brief is based on the following decisions occurring after the filing of the Petition on May 31, 1988: *Allied Tube & Conduit Corporation v. Indian Head, Inc.*, No. 87-157, 486 U.S. —, 108 S.Ct. 1931, (decided June 13, 1988) (Appendix IX, B-21-43) holding that a conspiracy involving and including public officials would not be immunized by the Noerr-Pennington Doctrine (108 S.Ct. 1938, fn.7, (B-30)); *Sessions Tank Liners, Inc., dba Southwest Tank Liners, Inc. v. Joor Manufacturing, Inc.*, No. 87-916 (decided June 27, 1988) granting cert. and remanding to 9th Circuit. (Appendix X, B-44); 9th Circuit Decision July 22, 1988, remanding to District Court for further evidence establishing antitrust violations (Appendix XI, B-45, 46); Judgment of Dismissal of Petitioners' state court claims of inverse condemnation and promissory estoppel based on doctrine of collateral estoppel of the Ninth Circuit decision immunizing activity of respondents based on state action and Noerr-Pennington Immunity Doctrines. (Appendix III and IV, B-8-12).

ISSUES RELATED TO NEW CASES

A. Is the Ninth Circuit decision contrary to *Allied Tube, supra*?

B. Is a conspiracy involving and including the executive director of the Redevelopment Agency, Frank Taylor, to give the Koll Company a monopoly and market power in a market in which the legislature has expressly prohibited the displacement of competition immunized by the Noerr-Pennington Doctrine?

C. Should Petitioners be allowed discovery to determine and establish the extent and nature of the antitrust violations charged in conformance with the recent decision in *Sessions Tank, supra*?

D. Is the conduct of the executive director of the Redevelopment Agency, Frank Taylor, denying Petitioners the parking promised in the original redevelopment plan (B-1) and the amended plan (B6-7) in conspiracy with Koll, an administrative

decision which would not be immunized by the Noerr-Pennington Doctrine?

E. Was the 1983 amended plan (B4-7) a sham meant to deceive Petitioners thus establishing the sham exception to the Noerr-Pennington Doctrine?

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I. The Ninth Circuit decision is contrary to the Supreme Court decision in <i>Allied Tube & Conduit Corporation v. Indian Head, Inc.</i> , No. 87-157, 486 U.S. ____; 108 S.Ct. 1931 (decided 6/13/88)	
II. The Ninth Circuit decision abrogates all intelligible guidance to the courts or litigants on the issue of Noerr-Pennington immunity and is contrary to <i>Mine Workers v. Pennington</i> , 38 U.S. 657, 671 (1965); <i>California Motor Transport Co. v. Trucking Unlimited</i> , 404 U.S. 508, at 513 (1972) and <i>Continental Ore Co. v. Union Carbide & Carbon Corp.</i> , 370 U.S. 690, 707-708 (1962)	
III. The Ninth Circuit decision sets the dangerous and erroneous standard that no evidentiary development may be had by the victim who is trying to establish the antitrust violation in violation of <i>Conely v. Gibson</i> , 355 U.S. 42, 45; 70 S.Ct. 99 (1957)	
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No. 87-2086

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

DAVID A. BOONE, et. al.,
Petitioners,

VS.

REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE, et al.,
Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS



OPINION BELOW

The Opinion and judgment of the Court of Appeals (Appendix A-1-22) affirmed the dismissal of Petitioners Second Amended Complaint without leave to amend, relying in part on its clearly erroneous finding pursuant to Rule (b)(6) FRCP.¹

STATEMENT OF THE CASE

Neither the Ninth Circuit or the respondents have ever discussed or addressed the real factual graveman of this action, that is a conspiracy involving the executive director of the Redevelopment Agency and the Koll Company to publicly propose a sham invalid amended redevelopment plan (Appendix II, B-4-7) which supposedly provided petitioners with their essential parking requirements when in fact secretly the executive director and Koll Company had conspired to restrain trade in a market in which the state legislature prohibited the displacement of competition, by denying petitioners their essential parking through administrative action of the director. (Appendix C, A-46, 55, 56)

In December of 1983 the executive director of the Redevelopment Agency, Frank Taylor, and the Koll Company publicly proposed to amend the redevelopment plan to provide for condemnation although blight had been alleviated by private enterprise acting alone, Appendix VI, B-15. But to deceive petitioners not to challenge the Amended Redevelopment Plan within the

¹References to the Appendix are given in the following form: page 1 of the Appendix to the original Petition is referred to as Appendix A, "A-1", etc.; page 1 of the Appendix to the Supplemental Brief is referred to as Appendix I (Roman Numeral), "B-1," etc.

After taking extensive discovery defendants move for dismissal pursuant to Rule 12(b)(6). The District Court granted that motion without leave to amend, relying in part on its clearly erroneous finding that petitioners had stipulated to the order staying discovery when in fact petitioners opposed the staying of discovery and the order so recites that the nature of the hearing was contested (Appendix B, A-27; Appendix I, A-159-160; Petition p. 5)

60-day period provided for in H&S Code § 33500² they incorporated into the plan various provisions for "*adequate land for parking and open spaces*" and "*parking facilities*," "*of benefit to the project area*." (Appendix II, B-6-7).

The deception was successful and on December 6, 1983, Frank Taylor, executive director of the agency proposed the amended redevelopment plan (without the required finding of blight) to the City Council and it was adopted with the stated provisions for parking (Appendix II, B-6-7) and not protested by petitioners, who were in fact deceived by the promises of parking made both in the plan and elsewhere by the conspirators. (Appendix C, Ap-51-55)³

In November 1984, 11 months after the amended plan was adopted, and 8 months after the Koll project was approved the Agency by administrative decision *denied* dedicated parking to all building owners other than Koll. With this administratively granted parking monopoly defendants could carry out their design to grant Koll a monopoly in office space rental. (Appendix C, 55, 56)

Thus, Koll has been able to acquire 2 buildings by distressed sale and force petitioner and another building into foreclosure and bankruptcy with the likelihood Koll will also acquire these buildings because Koll has all the parking. (Petition p. 4)

² In fact, both the Agency and Koll used the deception in their successful attempts to have petitioners' Federal and State Court actions dismissed for failing to challenge the 1983 Amended plan within the statutory 60-day period (Appendix VII, B-16-18; Appendix VIII, B-19-20).

³ The Ninth Circuit has held that it is not required to name the "other conspirators." A plaintiff need not sue all conspirators, he may chose to sue but one. *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 8 (9th Cir. 1963).

REASONS FOR GRANTING WRIT

I., II., and III.*

THE *ALLIED TUBE* DECISION MAKES CLEAR THAT DEFENDANT HERE HAVE NO *NOERR-PENNINGTON* IMMUNITY

By finding Noerr-Pennington immunity for defendant The Koll Company ("Koll"), the decision below is directly contrary to this Court's recent decision in *Allied Tube Conduit Corp. v. Indian Head*, June 13, 1988, No. 87-157, 486 U.S. ____; 108 S.Ct. 1931 (June 13, 1988) (B-21).

As pleaded here the facts show a secret conspiracy between Koll and Redevelopment officials to exclude competitors and monopolize a commercial rental market *in violation* of the state statute giving the redevelopment agency power to act only when private enterprise cannot eliminate blight. Here private enterprise *had* successfully developed the area and had eliminated blight. *Emmington v. Solano County Redevelopment Agency*, 195 Cal.App.3d 491, 497, 237 Cal.Rptr. 636 (June 1987); *Regus v. City of Baldwin Park*, 70 Cal.App.3d 968, 980, 139 Cal.Rptr. 196 (1977) (See, Petition p. 10).

Thus, without *any* legislative authority to displace competition or commit anti-competitive conduct, the Redevelopment Agency, by involving itself in the business of Koll's office space development was essentially acting in connection with commercial transactions and was in fact secret competitor illegally using its power for the benefit of Koll. As held in *Allied Tube, supra*:

"Just as the antitrust laws should not regulate political activities 'simply because those activities have a commercial aspect' (citation omitted) so the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact." 56 L.W. 4542-3; 108 S.Ct. 1941 (B-35).

* The reasons for granting Writ (page iii) are by nature interwoven therefore they are presented in one argument and incorporated herein by reference.

As pointed out in both the majority and dissenting opinions in *Allied Tube, supra*, the real intent of the *Noerr* doctrine is the protection of free and open discourse between citizens and other persons and the government. Both opinions condemn bribery and misrepresentation in connection with that communication, yet the pleaded facts imply both and allege illegal campaign contributions, other inducements to violate state law, and numerous misrepresentations. (Appendix C, A-44; Appendix J, A-163-174; Appendix K, A-175-184) And neither the majority or dissent adopt the position, essentially adopted by the Ninth Circuit in this case, that simply because *some* governmental act is involved, *all* activity aimed at attaining that act is protected. The Ninth Circuit, by here finding *Noerr* immunity, essentially adopted the "absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action." A position condemned by this Court in *Allied Tube, supra*, at 108 S.Ct. 1938 (B-31).

This Court noted in footnote 7 of the *Allied Tube* majority opinion, 108 S.Ct. 1938 (CB-30), that *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), at 513, held that conspiracy with a licensing authority to eliminate a competitor may violate the antitrust laws. In the same footnote, it was indicated that a *conspiracy* involving and including public officials would not be immunized. Further, the footnote cites to the decision in *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 707-708 (1962) where in it was held that where commercial activities are involved:

"To subject to liability under the Sherman Act for eliminating a competitor . . . would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedom spoken of in *Noerr*."

That same footnote cited 1 P. Areeda & D. Turner, *Antitrust Law*, § 201-206 (1978) wherein it is made clear that the *Noerr* doctrine protects neither improper conduct nor conduct in connection with commercial transactions.

The Ninth Circuit had supported this position, for example, in *Sessions Tank Liners, Inc., dba Southwest Tank Lines, Inc. v. Joor Manufacturing, Inc.*, 827 F.2d 488 at 466 (9th Cir. 1987):

3. Conspiracy.

Antitrust immunity under *Noerr-Pennington* does not extend to private parties who have entered into a "conspiracy" with governmental actors. See *Clipper Express*, 690 F.2d at 1252 n. 17; *Harman v. Valley Nat's Bank*, 339 F.2d 564, 566 (9th Cir. 1964); P. Areeda & H. Hovenkamp, *Antitrust Law* 20-25 (Supp. 1986). (Emphasis added.)

In this action the Ninth Circuit abandoned its prior rule. (Appendix A, A-21).

The opinion below was contrary to *each* of these points. The core of the instant case is that there was a conspiracy between Koll and the Redevelopment Agency officials in connection with the commercial development of office space to eliminate all of Koll's competitors. To extend *Noerr* immunity to such a conspiracy is plainly contrary to *each* aspect of footnote 7 of the *Allied Tube* decision. While the dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious, here the intentional and duplicitous acts successfully aimed at eliminating the competitors of Koll, in contravention of the state authorizing statute, surely are the result of the private, secret action of Koll.

In its 1987 decision in *Sessions Tank Liners, Inc., supra*, the Ninth Circuit applied the *Noerr-Pennington* doctrine to immunize open lobbying within a private standard setting association. Had the Ninth Circuit adhered to the law as it stated in *Session* in 1987, it would have here denied Koll its requested immunity. It then held, at 827 F.2d 465 fn.5:

"But there are other instances of sham petitioning in which the defendant genuinely seeks to achieve his governmental result, but does so *through improper means*. . . . [citation omitted] In such cases, the defendant may well succeed in procuring the desired governmental action, but has nonetheless misused his petitioning privilege. Thus, de-

fendant's 'success or failure' is 'one indicator' of whether his petitioning was a sham, *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 903 (9th Cir. 1983), *but it is not dispositive*.

"Commentators occasionally urge courts to use the word "sham" only when referring to disingenuous—rather than unethical—petitioning. But in both cases there is a pretense of seeking an independent, impartial decision. Thus both may fairly be called shams." See Hurwitz, *supra* note 4, at 109.⁴

Koll publicly requested permission to build a building in the project area but *secretly* conspired to administratively deny petitioners and other building owners any parking so that Koll could take over their buildings monopolizing the market.

In *Sessions* the Ninth Circuit found none of the improper means or misuse of the petitioning privilege which are clearly present in the conspiracy here in detail. It applied *Noerr-Pennington* immunity as immunizing the proper lobbying there presented. Yet this Court *reversed Sessions* holding that even such lobbying might be denied *Noerr-Pennington* immunity. And the Ninth Circuit, in its opinion of July 22, 1988, remanded to the District Court for factual findings. The reversal of *Sessions*, where summary judgment had been granted after full discovery, makes even more clear the need for reversal here where it must be taken as true that there was a secret monopolizing conspiracy undercutting legitimate government functions and law. To subject to liability open communication with private associations while immunizing secret monopolistic deals with redevelopment officials does not serve the democratic interests protected by *Noerr-Pennington*.

Allied Tube, in footnote 10, 108 S.Ct. 194, Appendix IX, B-35, emphasizes the difficulty of drawing precise lines between immunized political activity with political impact from unprotected

⁴ *Sessions*, *supra*, holds on page 468 "Where executive action sought was more a matter of *administering* than making law misrepresentations inducing governmental decision will be actionable in antitrust despite the *Noerr-Pennington* doctrine." (Emphasis added.)

activity. It criticizes the Ninth Circuit approach to the "sham" exception to *Noerr-Pennington* which immunizes the use of improper means to achieve genuinely desired results. It was that criticized approach which the Ninth Circuit used in the instant case. Without any factual development as an act to determine on which side of the line the Koll's activity fell, the Ninth Circuit found complete immunity for its secret conspiratorial activities to undermine legitimate government functions.

There is a third major inconsistency between the holding of the Ninth Circuit in this case and that of this Court in *Allied Tube, supra*. In *Allied Tube* this Court held at Appendix IX, 108 S.Ct. 1939-B-32):

"We thus conclude that the *Noerr* immunity of anticompetitive activity intended to influence the government *depends not only on the impact, but also on the context and nature of the activity.*" (Emphasis added.)

"What distinguishes this case from *Noerr* and its progeny is that the context and nature of [the] activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves."

The Court in *Noerr* concluded that the political context and nature of the activity did preclude inquiry into its antitrust validity.

However, in the instant case as in *Allied Tube, supra*, the content and nature of the activity do *not* counsel against inquiry into its validity. Unlike the publicity campaign in *Noerr*, the activity here at issue did *not* take place in the open political arena, where partisanship is the hallmark of decision making, but instead was within the confines of private, administrative and secret meetings and was designed to circumvent the normal political and decision making process and in fact violated State law prohibiting the very anti-competitive conduct charged herein.

The activity here, a scheme to use various illegal means to monopolize parking in an area and thereby monopolize the market for office rentals, if carried out completely in the private

sector would be one which would normally be held violative of the Sherman Act. As held in *Allied Tube, supra*:

"just as the antitrust laws should not regulate political activities 'simply because those activities have a commercial impact' [citation omitted] so the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact." 108 S.Ct. 1941 (B-35)."

As a final note, it should be pointed out that the Ninth Circuit considered that petitioners might gain relief through their state court action. (Appendix A, A-10) Yet there can be no relief there since defendants, on collateral estoppel grounds, based on this action sought and obtained dismissal of that state court action (Appendix III, B-10). So by granting immunity in this action, the courts below effectively immunized defendants illegal monopolistic conduct.

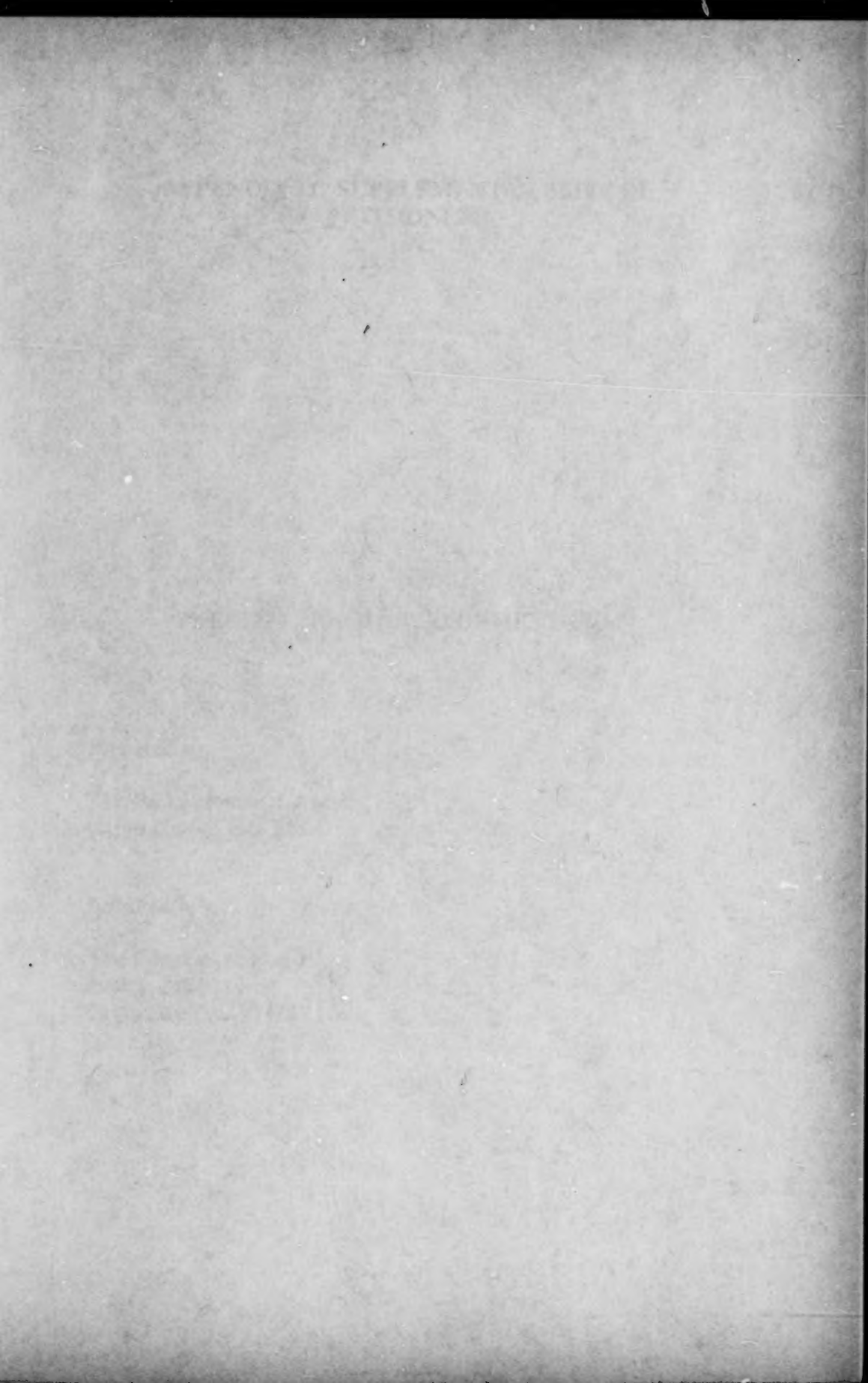
CONCLUSION

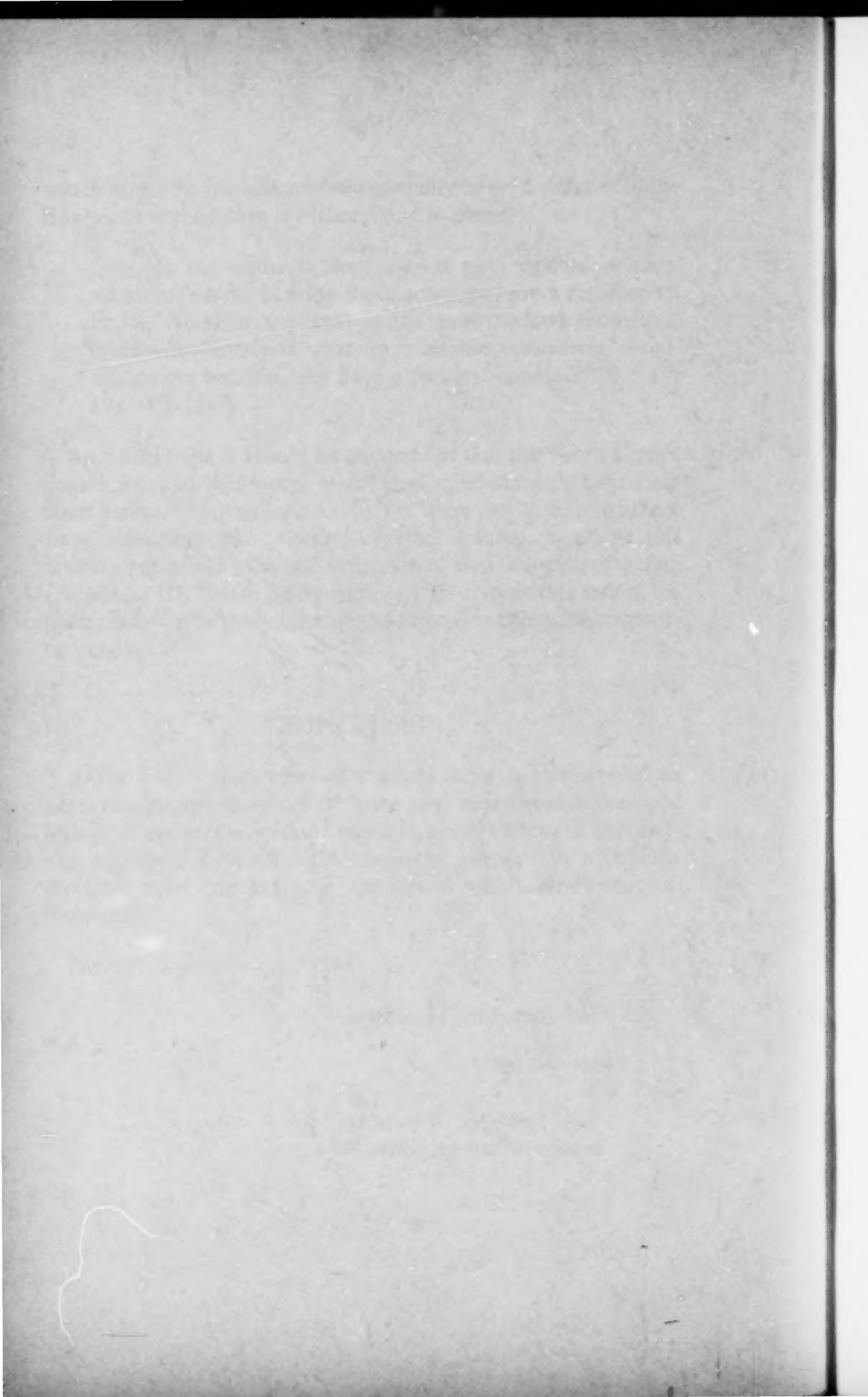
Allied Tube makes clear that where there is presence of, as here, conspiracy, violations of State law, misrepresentation, and bribery in connection with monopolization in an area of commercial activity in which a Redevelopment Agency has wrongfully involved itself prevent *any* application of *Noerr-Pennington* immunity.

Dated: September 23, 1988

Respectfully submitted,

HERBERT F. KAISER
Attorney for Petitioners





B-1

**APPENDIX TO SUPPLEMENTAL BRIEF OF
PETITIONERS**

PUEBLO UNO REDEVELOPMENT PLAN

Prepared by

The Redevelopment Agency
of the City of San Jose

Adopted by

The City Council on
July 8, 1975,
Ordinance No. 17778

* * * *

3. Parking

Private parking shall be permitted in conjunction with retail or office developments. Interim surface parking is permitted in phased developments, ultimately to be replaced by retail or office uses at the first floor level. Parking shall serve the short-term demand generated by the permitted land uses. The long range objective is to eliminate curb and surface parking in the core area. **However, phased development must consider the needs of existing business.** There is no intent in this plan to reduce the parking and traffic facilities essential to the operation of present business.

The intent of the Core Area Plan is to develop off-street parking for short-term commercial uses and residential uses conveniently located at the generators of activity. Long-term parking for such commercial uses is intended to be provided around the periphery of the project with a traffic distribution network established to connect those areas with the core. The City is now discussing with the County Transit District ways and means of developing a shuttle system connecting off-street parking, peripheral parking and activity centers within the core area.

* * * *

301 Owner Participation and Rehabilitation

Because this project does not rely on condemnation proceedings to achieve its objective, the project must rest on the cooperative spirit of the City, the Redevelopment Agency, property owners and tenants of the Project Area to achieve success. The City of San Jose and the Redevelopment Agency will encourage viable rehabilitation programs but private cooperation will be required to implement the rehabilitation programs.

In the event an owner is unable to cooperate in the redevelopment or rehabilitation of his property and with the consent of the owner the Agency *may*, if funding sources are available, acquire (by purchase, lease, grant, bequest, or otherwise) all or a sufficient interest in the property in order to carry out the objectives of the Plan.

* * * *

309 Project Planning Activities

One of the objectives of the Redevelopment Plan is to attract private capital into the area. To accomplish this, the City reasons that by funding public improvements new private investments will be attracted into the area, thereby encouraging proper utilization of the area and returning it to a useful and productive condition.

* * * *

310 Citizen Participation

A committee, consisting of representatives selected by the property owners in the Pueblo Uno Area, shall be formed. One purpose of the committee would be to participate in the formation of plans, in the implementation of projects and to make formal recommendations to the City Council before any public hearings are conducted relative to changes in the Pueblo Uno Plan.

City administration shall present no plans or project recommendations to the City Council without first submitting them to the citizens committee for recommendation to the Council.

* * * *

Integrated Parking

One of the objectives of the Core Area Sketch Plan, and relative to new development within the project area is to provide convenient parking. This can be accomplished by integrating the parking for the structure on the second or second and third levels of the structure. Such parking facilities would generally be devoted to short-term parkers; e.g., shoppers, clients, visitors and residents.

PUEBLO UNO REDEVELOPMENT PLAN

Prepared by

The Redevelopment Agency
of the City of San Jose

Adopted by

The City Council on
December 6, 1983
Ordinance No. 215210

100. DESCRIPTION OF PROJECT

101. Introduction

This Redevelopment Plan (hereafter the "Plan") for the Pueblo Uno Redevelopment Project (hereafter the "Project") has been prepared by the Redevelopment Agency of the City of San Jose (hereafter the "Agency") **pursuant to the Community Redevelopment Law of the California Health and Safety Code, and all applicable local laws and ordinances.**

This plan conforms to the General Plan of the City of San Jose insofar as the General Plan applies to the Project.

This Plan provides the Agency with powers, duties and obligations to implement the program generally formulated in this Plan for the redevelopment, rehabilitation and revitalization of the area within the boundaries of the Project (the "Project Area"). Due to the needs of the Project, the long-term nature of the Plan, and the need for flexible response to such factors as market and financial conditions, **participating property owner** and potential developer **needs** as well as opportunities for Agency action, this Plan does not present a precise plan or establish specific projects for the redevelopment, rehabilitation and revitalization of the Project Area, neither does this Plan present specific proposals in an attempt to solve or alleviate the problems and issues identified by the community relating to the Project Area. Instead, this Plan presents a process and a basic framework within which specific plans will be presented, specific solutions will be proposed, and specific projects may be approved.

The major goal of this Plan is to advance the purposes of the Community Redevelopment Law by:

- A. **The strengthening of the economic base of the Project Area and the community generally** by the provision of necessary assistance to stimulate new commercial and/or industrial expansion, and growth of employment.
- B. The re-planning, re-design, and development of undeveloped areas which are economically stagnant, physically constrained, or improperly utilized.
- C. The elimination of environmental deficiencies in the Project Area, including small and irregular lots, obsolete

and aged building types, substandard alleys and deteriorated public improvements, and the like.

- D. The strengthening of retail and other commercial functions in the downtown area.
- E. The assembly of land into parcels suitable for appropriate, integrated development designed to provide improved pedestrian and vehicular circulation in the Project Area.
- F. **The provision of adequate land for parking and open spaces.**
- G. The establishment and implementation of performance criteria to assure high site design standards and environmental quality and other design elements which provide unity and integrity to the entire Project.
- H. The expansion of the community's supply of low-and-moderate income housing.

* * * *

300. PROJECT PROPOSALS

301. Opportunities for Owners and Tenants

In accordance with this Plan and the rules for owner and tenant participation adopted by the Agency pursuant to this Plan and the Community Redevelopment Law, persons who are owners of real property in the Project Area shall be given a reasonable opportunity to participate in redevelopment by: (1) retaining all or a portion of their properties; (2) **acquiring adjacent or other properties in the Project Area;** (3) rehabilitation of existing buildings or improvements; (4) new development; or (5) selling their properties to the Agency and purchasing other properties in the Project Area.

The Agency shall extend reasonable preference to persons who are engaged in business in the Project Area to participate in the redevelopment of the Project Area, or to re-enter into business within the redeveloped Project Area, if they otherwise meet the requirements prescribed in this Plan. The Agency shall also extend reasonable preferences to tenants other than business tenants in the Project Area to re-enter within the redeveloped Project Area, if they otherwise meet the requirements prescribed

by this Plan. Such business, residential, institutional and semi-public tenants shall be given a reasonable opportunity, if they so desire, to purchase and develop real property in the Project Area in accordance with this Plan.

302. Owners and Tenants Committee

A committee, membership of which shall be open to all Project Area owners and tenants, may be formed pursuant to this Plan. Agency shall consult with the committee during development and implementation of Project proposals.

319. Development by the Agency

To the extent now or hereafter permitted by law, the Agency is authorized to pay for, develop or construct any publicly-owned building, facility, structure or other improvement either within or without the Project Area, for itself or for any public body or entity, which buildings, facilities, structures or other improvements are or would be of benefit to the Project Area. Specifically, the Agency may pay for, install or construct buildings, facilities, structures and other improvements and may acquire or pay for the land required therefor.

In addition to the public improvements authorized under this Section 319, the Agency is authorized to install and construct, or to cause to be installed and **constructed, within or without the Project Area,** for itself or for any public body or entity for the benefit of the Project Area, public improvements and public utilities, including, but not limited to, the following: (i) over and underpasses; (2) sewers; (3) natural gas distribution systems; (4) water distribution systems; (5) parks, plazas and pedestrian paths; (6) playgrounds; (7) **parking facilities;** (8) landscaped areas; and (9) street improvements.

HERBERT F. KAISER, ESQ.

The Alcoa Building, Suite 1600
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 392-1184

Attorney for Plaintiffs

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY
OF SANTA CLARA

Case No. 594949

DAVID A. BOONE and STEPHEN P. FOX,
individually and as general partners
of DBS-3 GROUP, a California Limited
Partnership, as general partners of
MARKET/POST, LTD., a California
Limited Partnership; DAVID GOGGIO
and DONALD GOGGIO, individually and as
general partners of THREE G'S, a
California Limited Partnership,

Plaintiffs,

v.

REDEVELOPMENT AGENCY OF THE
CITY OF SAN JOSE, et al.,

Defendants.

ORDER SUSTAINING DEMURRERS
[Filed July 29, 1988]

The demurrers of defendants Redevelopment Agency of the City of San Jose ("Redevelopment Agency") and the City of San Jose ("City") to plaintiffs' Fourth Amended Complaint were heard and submitted by the parties on July 15, 1988, in Department 2 of this Court. James G. Gilliland, Jr., of Khourie, Crew & Jaeger, P.C., appeared for moving parties Redevelopment Agency

and City. Herbert F. Kaiser appeared for plaintiffs. Moving parties contended the Fourth Amended Complaint failed to state claims on which relief could be granted for each of the reasons asserted by the defendants in their opening and reply briefs as identified in the attached statement.

IT IS HEREBY ORDERED that for each of the reasons asserted by defendants the demurrers of the Redevelopment Agency and City to all three causes of action of plaintiffs' Fourth Amended Complaint are sustained without leave to amend.

Dated: July 29, 1988

/s/ GEORGE W. BONNEY

Honorable George W. Bonney
Judge of the Superior Court

Approved as to form:

Dated: July 26, 1988

/s/ HERBERT F. KAISER

Herbert F. Kaiser
Attorney for Plaintiffs

Dated: July 26, 1988

/s/ JAMES G. GILLILAND, JR.

James G. Gilliland, Jr.
Attorney for Defendants

ATTACHMENT

- I. PLAINTIFFS HAVE NOT STATED FACTS CREATING AN ESTOPPEL AGAINST THE CITY OR AGENCY
 - A. Established Public Policy Requires Dismissal of Plaintiffs' Equitable Estoppel Claim
 - B. Plaintiffs Admittedly Did Not Rely On Any Promises Made Before October, 1982
 - C. The City Officials' Clear Lack of Authority Bars Plaintiffs' Equitable Estoppel Claim
- II. PLAINTIFFS MAY NOT PROSECUTE THEIR INVERSE CONDEMNATION CLAIM ON THE FACTS ALLEGED
 - A. The Regulatory Activity Alleged Cannot Constitute A Compensable "Taking"
 1. Plaintiffs Have Not Suffered The Type Of Injury Compensable Under A "Taking" Theory
 2. Plaintiffs Cannot Allege Agency Conduct Giving Rise To An Inverse Condemnation Claim
 - B. Plaintiffs' Are Absolutely Barred From Prosecuting Their Third Cause Of Action For Damages
- III. PLAINTIFFS MAY NOT MAINTAIN THEIR SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF
 - A. Plaintiffs' Challenges To The Validity Of The Pueblo Uno Redevelopment Plan And The Amendments To The Plan Are Barred By The Statute Of Limitations
 - B. No Claim Is Stated For Declaratory Relief
- IV. THE NINTH CIRCUIT IN *BOONE, ET AL. V. REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE* (9th Cir. 3/1/88) 841 F.2d 886, *Pet. For Cert.* filed 5/31/88, HAS ENTERED A JUDGMENT THAT DISPOSES OF BOTH OF PLAINTIFFS' CLAIMS FOR PROMISSORY ESTOPPEL AND INVERSE CONDEMNATION (Emphasis added)

Khourie, Crew & Jaeger, P.C.
Michael N. Khourie
James G. Gilliland, Jr.
Mark T. Jansen
One Market Plaza
Spear Street Tower, 40th Floor
San Francisco, CA 94105
Telephone (415) 777-0333

Joan Gallo
City Attorney, City of San Jose
Mollie J. Dent
151 West Mission Street
San Jose, CA 95110
Telephone: (408) 277-4454

Attorneys for Defendants
City of San Jose and Redevelopment
Agency of the City of San Jose

In the Superior Court of the State of California

In and For the County of Santa Clara

Case No. 594 949

David A. Boone, Stephen P. Fox, DSB-3 Group,
Market/Post Ltd., Dave Goglio, Donald Goglio, Three G's,
Plaintiffs,

vs.

Redevelopment Agency of the City of San Jose,
City of San Jose, and Does I-XX,
Defendants.

Judgment of Dismissal As To Defendants Redevelopment
Agency of the City of San Jose and the City of San Jose

[Filed July 29, 1988]

It appearing from the files and records of this action that the
Court has sustained the demurrers of the defendants Redevelop-
ment Agency of the City of San Jose and the City of San Jose as

to all causes of action herein, and it further appearing that said defendants have applied for a judgment dismissing this action as to them,

IT IS HEREBY ORDERED, adjudged and decreed THAT THIS ACTION IS DISMISSED as to defendants Redevelopment Agency of the City of San Jose and the City of San Jose, and that those defendants are awarded their costs of suit incurred herein, subject to filing of a cost bill and settlement of said bill.

DATED: _____, 1988

GEORGE W. BONNEY

Judge of the Superior Court

ORDINANCE NO. 17778

AN ORDINANCE OF THE CITY OF SAN JOSE APPROVING AND ADOPTING A REDEVELOPMENT PLAN FOR THE PUEBLO UNO PROJECT AREA SITUATE IN THE CITY OF SAN JOSE, COUNTY OF SANTA CLARA, SAID PLAN BEING ENTITLED "PUEBLO UNO REDEVELOPMENT PLAN, MAY 1975"; OVERRULING ALL PROTESTS OR OBJECTIONS THERETO; INCORPORATING SAID REDEVELOPMENT PLAN BY REFERENCE; DESIGNATING SAID REDEVELOPMENT PLAN AS THE OFFICIAL REDEVELOPMENT PLAN FOR SAID PROJECT AREA; MAKING FINDINGS AND DETERMINATIONS RESPECTING CERTAIN MATTERS AS REQUIRED BY LAW; AND OTHERWISE RELATING TO SAID REDEVELOPMENT PLAN, ITS PREPARATION AND ADOPTION.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

* * * *

SECTION 3. This Council hereby finds and determines, and declares that:

(1) The Pueblo Uno Project Area is a blighted area, the redevelopment of which is necessary to effectuate the public purposes declared in the Community Redevelopment Law.

(2) Said redevelopment plan will redevelop the said project area in conformity with the Community Redevelopment Law and in the interests of the public peace, health, safety and welfare.

(3) The adoption and carrying out of said redevelopment plan is economically sound and feasible.

(4) Said redevelopment plan conforms to the general plan of the City of San Jose entitled, "San Jose General Plan: 1966-2010," dated January 1966, as amended.

(5) The carrying out of said redevelopment plan will promote the public peace, health, safety and welfare of the City of San Jose and will effectuate the purposes and policy of the Community Redevelopment Law.

(6) The condemnation of real property is not provided for in said redevelopment plan.

(7) The redevelopment plan does not provide for the temporary or permanent displacement of occupants of housing facilities in said project area.

(8) That within a reasonable time before its approval of said redevelopment plan said Redevelopment Agency adopted, and made available for public inspection, rules to implement the owner participation provisions of said redevelopment plan.

(9) That said redevelopment plan contains adequate safeguards that the work of redevelopment will be carried out pursuant to said redevelopment plan, and provides for the retention of controls and the establishment of restrictions or covenants running with land sold or leased for private use for such periods of time and under such conditions as this Council deems necessary to effectuate the purposes of the Community Redevelopment Law.

* * * *

Recorded January 20, 1984
Santa Clara County Recorder
Serial #7953712; Book 1246;
Pages 98-100

ORDINANCE NO. 21510

ORDINANCE OF THE CITY OF SAN JOSE APPROVING AND ADOPTING AN AMENDMENT TO THE REDEVELOPMENT PLAN ENTITLED, "SECOND AMENDED REDEVELOPMENT PLAN PUEBLO UNO PROJECT"; ADDRESSING FINDINGS AND DETERMINATIONS RESPECTING CERTAIN MATTERS AS REQUIRED BY LAW; AND OTHERWISE RELATING TO SAID REDEVELOPMENT PLAN AND AMENDMENT

THE CITY COUNCIL OF THE CITY OF SAN JOSE DOES HEREBY ORDAIN AS FOLLOWS:

* * * *

H. Said hearing did comply in all respects with said Community Redevelopment Law and was conducted in accordance with and as required by the laws of the State of California pertaining to such hearing;

I. The Third Amendment to the Redevelopment Plan for Pueblo Uno Project area is necessary and desirable in order to carry out the redevelopment plan for the Project area.

J. The proposed method of financing the project as amended has been previously submitted to and approved by the Agency Board and City Council as part of the 1983-84 Capital Improvement Program for the Pueblo Uno Project Area.

K. The condemnation of real property in the Project Area is necessary for the execution of the Redevelopment Plan.

* * * *

Khourie, Crew & Jaeger, P.C.
Michael N. Khourie
James G. Gilliland, Jr.
Mark T. Jansen
One Market Plaza
Spear Street Tower, 40th Floor
San Francisco, CA 94105
Telephone (415) 777-0333

Attorneys for Defendants
City of San Jose and Redevelopment
Agency of the City of San Jose

In the Superior Court of the State of California

In and For the County of Santa Clara

Case No. 594 949

David A. Boone, Stephen P. Fox, DSB-3 Group,
Market/Post Ltd., Dave Goglio, Donald Goglio, Three G's,
Plaintiffs,

v.

Redevelopment Agency of the City of San Jose,
City of San Jose, and Does I-XX,
Defendants.

Memorandum of Points and Authorities In Support of
Defendants' Demurrers To Plaintiffs' Fourth Amended
Complaint

Date: March 22, 1988
Time: 9:00 a.m.
Dept: 14—Law & Motion

VII. PLAINTIFFS MAY NOT MAINTAIN THEIR SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF

A. Plaintiffs' Challenges To The Validity Of The Pueblo Uno Redevelopment Plan And The Amendments To The Plan Are Barred By The Statute of Limitations

The gist of the plaintiffs' present complaint is that the City and Agency acted unlawfully and through improper procedures in amending and implementing the Redevelopment Plan in December 1983 and March 1984. (See FAC, paras. 46-47, 53-54, 67, 72(g), 79.) Plaintiffs' challenge to these redevelopment plan amendments are barred, however, by their failure to bring a timely challenge of these governmental actions.

The applicable statute of limitations, Cal.Health & S.C. § 33500, states that "[no] action attacking or otherwise questioning the validity of any . . . amendment to a redevelopment plan, . . . shall be brought . . . after the elapse of 60 days from . . . the date of adoption of the ordinance . . . amending the plan." This statute governs all challenges to either a plan amendment or any action taken pursuant to the plan. *Plunkett v. City of Lakewood* (1975) 44 Cal.App.3d 344, 115 Cal.Rptr. 885, 886; *Community Redev. Agency of Los Angeles v. Superior Court* (1967) 248 Cal.App.2d 164, 172, 56 Cal.Rptr. 201, 206. In *Plunkett*, supra, the court refused to entertain a suit claiming that a redevelopment ordinance was the result of fraud (similar to the pleading of inducement here):

"Whether [plaintiff] claims the city council was wrong by mistake or wrong by intent, in either case he is contesting the validity of the plan, the adoption of the plan. The purpose of § 33500 is . . . to promote prompt adjudication of such challenges before substantial public funds have been expended and before relocation of business and people have rendered remedial action ineffective. . . . If suitors could avoid the requirements of § 33500 merely by adding allegations of fraud to their complaints the section would be rendered meaningless and its purpose lost."

44 Cal.App.3d at 347, 116 Cal.Rptr. at 886 (emphasis added). See also *Redevelopment Agency v. Del-Camp Investments, Inc.*

(1974) 138 Cal.App.3d 836, 113 Cal.Rptr. 762 (in condemnation proceedings brought pursuant to a redevelopment plan, condemnee could not challenge the plan's legality even though condemnation commenced more than 60 days after plan's adoption); *Johnston v. Redevelopment Agency* (9th Cir. 1963) 317 F.2d 872, 875, cert. denied (1963) 375 U.S. 915 (plaintiffs could not attack plan as violating requirements of federal Housing Act). Both *Plunkett* and *Del-Camp Investments* establish that section 33500 is an absolute bar against late challenges to redevelopment agency actions.

Alleged improprieties in the amendment process (for example, lack of compliance with procedural requirements and improper and illegal motivation behind the city's action) form the basis of plaintiffs' claims. These acts occurred in December 1983, when the Fourth Amended Plan was passed (FAC, paras. 46-47) or, at the latest, in March 1984, when the Development Agreement with Koll Company was approved (*id.*, paras. 53-54.) Plaintiffs did not file their first action until December 12, 1984, in federal court. (*Id.*, para. 70) Consequently, plaintiffs' request in the Second Cause of Action for a declaration that the "Plan" and "Amended Plan" are invalid and/or improperly implemented must fail. Defendants' demurrer to this cause of action should be sustained without leave to amend.

* * * *

J. David Black, Esq.
David T. Alexander, Esq.
Jackson, Tufts, Cole & Black
99 Almaden Boulevard, Suite 800
San Jose, California 95115
Telephone: (408) 998-1952

Attorneys for Defendant The Koll Company
United States District Court
Northern District of California
No. C 84 20772 WAI

David A. Boone and Stephen P. Fox, et al.,
Plaintiffs,

vs.

Redevelopment Agency of the City of San Jose, et al.,
Defendants.

Date: October 8, 1985
Time: 9:00 a.m.
Dept.: Hon. William A.
Ingram's Courtroom

Memorandum of Points and
Authorities In Support of Motion
To Dismiss Plaintiffs' Second Amended Complaint

VII.

PLAINTIFFS' ANTITRUST AND CIVIL RIGHTS
CLAIMS ARE NO MORE THAN BELATED ATTEMPTS
TO CHALLENGE A VALID REDEVELOPMENT PLAN

To the extent that plaintiffs' second amended complaint challenges any acts taken to complete or approve the Koll building, it is an untimely challenge to the December 6, 1983 amendment to the Redevelopment Plan and the March 29, 1984 resolution which authorized the Koll project. (Second Amended Complaint paragraphs 51, 56.) See, e.g., *Redevelopment Agency of City and County of San Francisco v. Del-Camp Investments, Inc.*, 38 Cal. App. 3d 836, 113 Cal. Rptr. 762 (1974) (pursuant to H. & S. Code § 33500, a party could not challenge condemnation proceedings instituted more than sixty days after the enactment of a redevelopment plan approving such proceedings); Koll's Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings, pp. 15-16. Thus plaintiffs may not challenge Koll's acts at building the office space and parking structure approved by the authority and directive of that amendment.

* * * *

[1931]

ALLIED TUBE & CONDUIT
CORPORATION, Petitioner

v.

INDIAN HEAD, INC.

No. 87-157.

Argued Feb. 24, 1988.

Decided June 13, 1988.

[1933] Marvin E. Frankel, New York City, for petitioner.
Fredric W. Yerman, New York City, for respondent.

*Syllabus**

The National Fire Protection Association—a private organization that includes members representing industry, labor, academia, insurers, organized medicine, firefighters, and government—sets and publishes product standards and codes related to fire protection. Its National Electric Code (Code), which establishes requirements for the design and installation of electrical wiring systems, is routinely adopted into law by a substantial number of state and local governments, and is widely adopted as setting acceptable standards by private product-certification laboratories, insurance underwriters, and electrical inspectors, contractors, and distributors. Throughout the relevant period, the Code permitted the use of electrical conduit made of steel. Respondent, a manufacturer of plastic conduit, initiated a proposal before the Association to extend Code approval to plastic conduit as well. The proposal was approved by one of the Association's professional panels, and thus could be adopted into the Code by a simple majority of the members attending the Association's 1980 annual meeting. Before the meeting was held, petitioner, the Nation's largest producer of steel conduit, members of the steel industry, other steel conduit manufacturers, and independent sales agents collectively agreed to exclude respon-

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

dent's product from the 1981 Code by packing the annual meeting with new Association members whose only function was to vote against respondents proposal. After the proposal was defeated at the meeting and an appeal to the Association's Board of Directors was denied, respondent brought suit in Federal District Court, alleging that petitioner and others had unreasonably restrained trade in the electrical conduit market in violation of § 1 of the Sherman Act. The jury found petitioner liable, but the court granted a judgment n.o.v. for petitioner, reasoning that it was entitled to antitrust immunity under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464. The Court of Appeals reversed.

Held: *Noerr* antitrust immunity does not apply to petitioner. Pp. 1936-1941.

(a) The scope of *Noerr* protection depends on the source, context, and nature of the anticompetitive restraint at issue. Where a restraint is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. In this case, the relevant context is the standard-setting process of a private association without official authority that includes members having horizontal and vertical business relations and economic incentives to restrain competition. Such an association cannot be treated as a "quasi-legislative" body simply because legislatures routinely adopt its Code, and thus petitioner does not enjoy the immunity afforded those who merely urge the government to restrain trade. Pp. 1936-1938.

(b) Nor does *Noerr* immunity apply to petitioner on the theory that the exclusion of plastic conduit from the Code, and the effect that exclusion had of its own force in the marketplace, were incidental to a valid effort to influence governmental action. Although, because a large number of [1934] governments routinely adopt the Code into law, efforts to influence the Association's standard-setting process are arguably the most effective means of influencing legislation regulating electrical conduit, and although *Noerr* immunity is not limited to "direct" petitioning of government officials, the *Noerr* doctrine does not immunize every concerted activity that is genuinely intended to influence govern-

mental action. There is no merit to the argument that, regardless of the Association's nonlegislative status, petitioner's efforts to influence the Association must be given the same wide berth accorded legislative lobbying or efforts to influence legislative action in the political arena. Pp. 1938-1940.

(c) Unlike the publicity campaign to influence legislation in *Noerr*, petitioner's activity did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but took place within the confines of a private standard-setting process. The validity of petitioner's efforts to influence the Code is not established, without more, by petitioner's literal compliance with the Association's rules, for the hope of the Code's procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition. An association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards. At least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace. Pp. 1940-1941.

817 F.2d 938 (CA2 1987), affirmed.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and MARSHALL, BLACKMUN, STEVENS, SCALIA, and KENNEDY, JJ., joined. WHITE, J., filed a dissenting opinion, in which O'CONNOR, J., joined.

Justice BRENNAN delivered the opinion of the Court.

Petitioner contends that its efforts to affect the product standard-setting process of a private association are immune from antitrust liability under the *Noerr* doctrine primarily because the association's standards are widely adopted into law by state and local governments. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). The United States Court of Appeals for the Second Circuit held that *Noerr* immunity did not apply. We affirm.

I

The National Fire Protection Association (Association) is a private, voluntary organization with more than 31,500 individual and group members representing industry, labor, academia, insurers, organized medicine, firefighters, and government. The Association, among other things, publishes product standards and codes related to fire protection through a process known as "consensus standard making." One of the codes it publishes is the National Electrical Code, which establishes product and performance requirements for the design and installation of electrical wiring systems. Revised every three years, the National Electric Code (Code) is the most influential electrical code in the nation. A substantial number of state and local governments routinely adopt the Code into law with little or no change; private certification laboratories, such as Underwriters Laboratories, normally will not list and label an electrical product that does not meet Code standards; many underwriters will refuse to insure structures that are not built in conformity with the Code; and many electrical inspectors, contractors, and distributors will not use a product that falls outside the Code.

Among the electrical products covered by the Code is electrical conduit, the hollow [1935] tubing used as a raceway to carry electrical wires through the walls and floors of buildings. Throughout the relevant period, the Code permitted using electrical conduit made of steel, and almost all conduit sold was in fact steel conduit. Starting in 1980, respondent began to offer plastic conduit made of polyvinyl chloride. Respondent claims its plastic conduit offers significant competitive advantages over steel conduit, including pliability, lower installed cost, and lower susceptibility to short circuiting. In 1980, however, there was also a scientific basis for concern that, during fires in high-rise buildings, polyvinyl chloride conduit might burn and emit toxic fumes.

Respondent initiated a proposal to include polyvinyl chloride conduit as an approved type of electrical conduit as an approved type of electrical conduit in the 1981 edition of the Code. Following approval by one of the Association's professional panels, this proposal was scheduled for consideration at the 1980 annual meeting, where it could be adopted or rejected by a simple majority of the members present. Alarmed that, if approved,

respondent's product might pose a competitive threat to steel conduit, petitioner, the nation's largest producer of steel conduit, met to plan strategy with, among others, members of the steel industry, other steel conduit manufacturers, and its independent sales agents. They collectively agreed to exclude respondent's product from the 1981 Code by packing the upcoming annual meeting with new Association members whose only function would be to vote against the polyvinyl chloride proposal.

Combined, the steel interests recruited 230 persons to join the Association and to attend the annual meeting to vote against the proposal. Petitioner alone recruited 155 persons—including employees, executives, sales agents, the agents' employees, employees from two divisions that did not sell electrical products, and the wife of a national sales director. Petitioner and the other steel interests also paid over \$100,000 for the membership, registration, and attendance expenses of these voters. At the annual meeting, the steel group voters were instructed where to sit and how and when to vote by group leaders who used walkie-talkies and hand signals to facilitate communication. Few of the steel group voters had any of the technical documentation necessary to follow the meeting. None of them spoke at the meeting to give their reasons for opposing the proposals to approve polyvinyl chloride conduit. Nonetheless, with their solid vote in opposition, the proposal was rejected and returned to committee by a vote of 394 to 390. Respondent appealed the membership's vote to the Association's Board of Directors, but the Board denied the appeal on the ground that, although the Association's rules had been circumvented, they had not been violated.¹

In October 1981, respondent brought this suit in Federal District Court, alleging that petitioner and others had unreasonably restrained trade in the electrical conduit market in violation of § 1 of the Sherman Act. 26 Stat. 209, 15 U.S.C. § 1. A bifurcated jury trial began in March 1985. Petitioner conceded that it had

¹ Respondent also sought a tentative interim amendment to the Code, but that was denied on the ground that there was not sufficient exigency to merit an interim amendment. The Association subsequently approved use of polyvinyl chloride conduit for buildings of less than four stories in the 1984 Code, and for all buildings in the 1987 Code.

conspired with the other steel interests to exclude respondent's product from the Code and that it had a pecuniary interest to do so. The jury, instructed under the rule of reason that respondent carried the burden of showing that the anticompetitive effects of petitioner's actions outweighed any procompetitive benefits of standard setting, found petitioner liable. In answers to special interrogatories, the jury found that petitioner did not violate any rules of the Association and acted, at least in part, based on a genuine belief that plastic conduit was unsafe, but that petitioner nonetheless did "subvert" the consensus standard making process of the Association. [1936] App. 23-24. The jury also made special findings that petitioner's actions had an adverse impact on competition; were not the least restrictive means of expressing petitioner's opposition to the use of polyvinyl chloride conduit in the marketplace, and unreasonably restrained trade in violation of the antitrust laws. The jury then awarded respondent damages, to be trebled, of \$3.8 million for lost profits resulting from the effect that excluding polyvinyl chloride conduit from the 1981 Code had of its own force in the marketplace. No damages were awarded for injuries stemming from the adoption of the 1981 Code by governmental entities.²

The District Court then granted a judgment n.o.v. for petitioner, reasoning that *Noerr* immunity applied because the Association was "akin to a legislature" and because petitioner, "by the use of methods consistent with acceptable standards of political action, genuinely intended to influence the [Association] with

² Although the District Court was of the view that at trial respondent relied solely on the theory that its injury "flowed from legislative action," App. to Pet. for Cert. 31a, the Court of Appeals determined that respondent was awarded damages *only* on the theory "that the stigma of not obtaining [Code] approval of its products and [petitioner's] 'marketing' of that stigma caused independent marketplace harm to [respondent] in those jurisdictions *permitting* use of [polyvinyl chloride] conduit, as well as those which later adopted the 1984 [Code], which permitted use of [polyvinyl chloride] conduit in buildings less than three stories high. [Respondent] did *not* seek redress for any injury arising from the adoption of the [Code] by the various governments." 817 F.2d 938, 941, n. 3 (CA2 1987) (emphasis added). We decide the case as it was framed by the Court of Appeals.

respect to the National Electrical Code, and to thereby influence the various state and local legislative bodies which adopt the [Code]." App. to Pet. for Cert. 28a, 30a. The Court of Appeals reversed, rejecting both the argument that the Association should be treated as a "quasi-legislative" body because legislatures routinely adopt the Code and the argument that efforts to influence the Code were immune under *Noerr* as indirect attempts to influence state and local governments. 817 F.2d 938 (CA2 1987). We granted certiorari to address important issues regarding the application of *Noerr* immunity to private standard-setting associations.³ 484 U.S. —, 108 S.Ct. 65, 9 L.Ed.2d 29 (1987).

II

Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability under the doctrine established by *Noerr*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *Mine Workers v. Pennington*, 381 U.S. 657, 669-672, 85 S.Ct. 1585, 1593-1595, 14 L.Ed.2d 626 (1965); and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). The scope of this protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue. "[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action," those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. *Noerr, supra*, 365 U.S., at 136, 81 S.Ct., at 529; see also *Pennington, supra*, 381 U.S., at 671, 85 S.Ct., at 1594. In addition, where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is "incidental" to a valid effort to influence governmental action. *Noerr, supra*, 365 U.S., at 143, 81 S.Ct., at 532-533. The validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity. A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the cam-

³ We also granted certiorari on the issue whether, if not immune under *Noerr*, petitioner's conduct violated the Sherman Act, but we now vacate our grant of that issue as improvident.

paign employs [1937] unethical and deceptive methods. *Noerr, supra*, 365 U.S., at 140-141, 81 S.Ct., at 531. But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.⁴ *California Motor Transport, supra*, 404 U.S., at 512-513, 92 S.Ct., at 612.

In this case, the restraint of trade on which liability was predicated was the Association's exclusion of respondent's product from the Code, and no damages were imposed for the incorporation of that Code by any government. The relevant context is thus the standard-setting process of a private association. Typically, private standard-setting associations, like the Association in this case, include members having horizontal and vertical business relations. See generally 7 P. Areeda, *Antitrust Law* ¶ 1477, p. 343 (1986) (trade and standard-setting associations routinely treated as continuing conspiracies of their members). There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.⁵ See *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571, 102 S.Ct. 1935, 1945, 72 L.Ed.2d 330 (1982). Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny. See, e.g., *ibid.*; *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961). See also *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d

⁴ Of course, in whatever forum, private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action. *Noerr*, 365 U.S., at 144, 81 S.Ct., at 533; *California Motor Transport*, 404 U.S., at 511, 92 S.Ct., at 612.

⁵ "Product standardization might impair competition in several ways. . . . [It] might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices." 7 P. Areeda, *Antitrust Law* ¶ 1503, p. 373 (1986).

445 (1986). When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, compare *Hydrolevel, supra*, 456 U.S., at 570-573, 102 S.Ct., at 1944-1946 (noting absence of "meaningful safeguards"), those private standards can have significant procompetitive advantages. It is this potential for procompetitive benefits that has led most lower courts to apply rule of reason analysis to product standard-setting by private associations.⁶

Given this context, petitioner does not enjoy the immunity accorded those who merely urge the government to restrain trade. We agree with the Court of Appeals that the Association cannot be treated as a "quasi-legislative" body simply because legislatures routinely adopt the Code the Association publishes. 817 F.2d, at 943-944. Whatever *de facto* authority the Association enjoys, no official authority has been conferred on it by any government, and the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-708, 82 S.Ct. 1404, 1415, 8 L.Ed.2d 777 (1962). See also *id.*, at 706-707, 82 S.Ct., at 1414-1415; *Goldfarb v. Virginia State [1938] Bar*, 421 U.S. 773, 791-792, 95 S.Ct. 2004, 2015, 44 L.Ed.2d 572 (1975). "We may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *Hallie v. Eau Claire*, 471 U.S. 34, 45, 105 S.Ct. 1713, 1719-1720, 85 L.Ed.2d 24 (1985). The dividing line between restraints resulting from governmental action and those resulting from

⁶ See 2 J. von Kalinowski, *Antitrust Laws and Trade Regulation* §§ 61.01[3], 61.03, 61.04, pp. 61-6 to 61-7, 61-18 to 61-29 (1981) (collecting cases). Concerted efforts to *enforce* (rather than just agree upon) private product standards face more rigorous antitrust scrutiny. See *Radiant Burners*, 364 U.S., at 659-660, 81 S.Ct., at 367. See also *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941).

private action may not always be obvious.⁷ But where, as here, the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty concluding that the restraint has resulted from private action.

Noerr immunity might still apply, however, if, as petitioner argues, the exclusion of polyvinyl chloride conduit from the Code, and the effect that exclusion had of its own force in the marketplace, were incidental to a valid effort to influence governmental action. Petitioner notes that the lion's share of the anticompetitive effect in this case came from the predictable adoption of the Code into law by a large number of state and local governments. See 817 F.2d, at 939, n. 1. Indeed, petitioner argues that, because state and local governments rely so heavily on the Code and lack the resources or technical expertise to second-guess it, efforts to influence the Association's standard-setting process are the most effective means of influencing legislation regulating electrical conduit. This claim to *Noerr* immunity has some force. The effort to influence governmental action in this case certainly cannot be characterized as a sham given the actual adoption of the 1981 Code into a number of statutes and local ordinances. Nor can we quarrel with petitioner's contention that, given the wide-spread adoption of the Code into law, any effect the 1981 Code had in the marketplace of its own force was, in the main,

⁷ See, e.g., *California Motor Transport*, 404 U.S., at 513, 92 S.Ct., at 613 (stating in dicta that "[c]onspiracy with a licensing authority to eliminate a competitor" or "bribery of a public purchasing agent" may violate the antitrust laws); *Mine Workers v. Pennington*, 381 U.S. 657, 671, and n. 4, 85 S.Ct. 1585, 1594, and n. 4, 14 L.Ed.2d 626 (1965) (holding that immunity applied but noting that the trade restraint at issue "was the act of a public official who is not claimed to be a co-conspirator" and contrasting *Continental Ore*); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-708, 82 S.Ct. 1404, 1415, 8 L.Ed.2d 777 (1962); 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 206 (1978) (discussing the extent to which *Noerr* immunity should apply to commercial transactions involving the government). See also *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-792, 95 S.Ct. 2004, 2015, 44 L.Ed.2d 572 (1975); *Continental Ore*, *supra*, 370 U.S., at 706-707, 82 S.Ct., at 1414.

incidental to petitioner's genuine effort to influence governmental action.⁸ And, as petitioner persuasively argues, the claim of *Noerr* immunity cannot be dismissed on the ground that the conduct at issue involved no "direct" petitioning of government officials, for *Noerr* itself immunized a form of "indirect" petitioning. See *Noerr*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) (immunizing a publicity campaign directed at the general public on the ground that it was part of an effort to influence legislative and executive action).

Nonetheless, the validity of petitioner's actions remains an issue. We cannot agree with petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to [1939] enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. But see *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-463, 65 S.Ct. 716, 725-729, 89 L.Ed. 1051 (1945). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. But see *Georgia v. Evans*, 316 U.S. 159, 62 S.Ct. 972, 86 L.Ed. 1346 (1942). Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action. Immunity might even be claimed for anticompetitive mergers on the theory that they give the merging corporations added political clout. Nor is it necessa-

⁸ The effect, independent of governmental action, that the 1981 Code had in the marketplace may to some extent have been exacerbated by petitioner's efforts to "market" the stigma respondent's product suffered by being excluded from the Code. See 817 F.2d, at 941, n. 3. Given our disposition *infra*, we need not decide whether, or to what extent, these "marketing" efforts alter the incidental status of the resulting anticompetitive harm. See generally *Noerr*, 365 U.S., at 142, 81 S.Ct., at 532 (noting that in that case there were "no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers").

rily dispositive that packing the Association's meeting may have been the most effective means of securing government action, for one could imagine situations where the most effective means of influencing government officials is bribery, and we have never suggested that that kind of attempt to influence the government merits protection. We thus conclude that the *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity.

Here petitioner's actions took place within the context of the standard-setting process of a private association. Having concluded that the Association is not a "quasi-legislative" body, we reject petitioner's argument that any efforts to influence the Association must be treated as efforts to influence a "quasi-legislature" and given the same wide berth accorded legislative lobbying. That rounding up supporters is an acceptable and constitutionally protected method of influencing elections does not mean that rounding up economically interested persons to set private standards must also be protected. Nor do we agree with petitioner's contention that, regardless of the Association's non-legislative status, the effort to influence the Code should receive the same wide latitude given ethically dubious efforts to influence legislative action in the political arena, see *Noerr, supra*, 365 U.S., at 140-141, 81 S.Ct., at 531, simply because the ultimate aim of the effort to influence the private standard-setting process was (principally) legislative action. The ultimate aim is not dispositive. A misrepresentation to a court would not necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena simply because the odds were very good that the court's decision would be codified—nor for that matter would misrepresentations made under oath at a legislative committee hearing in the hopes of spurring legislative action.

What distinguishes this case from *Noerr* and its progeny is that the context and nature of petitioner's activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves. True, in *Noerr* we immunized conduct that could be characterized as a conspiracy among railroads to destroy business relations between truckers

and their customers. *Noerr, supra*, 365 U.S., at 142, 81 S.Ct., at 532. But we noted there that:

"There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, all the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws. Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents discuss in one way or another the railroads' charges that heavy trucks injure the roads, violate the laws and create traffic hazards, and urge that truckers should be forced to pay a fair share of the costs of rebuilding the roads, that they should be [1940] compelled to obey the laws, and that limits should be placed upon the weight of the loads they are permitted to carry." 365 U.S., at 142-143, 81 S.Ct., at 532.

In light of those findings, we characterized the railroads' activity as a classic "attempt . . . to influence legislation by a campaign of publicity," an "inevitable" and "incidental" effect of which was "the infliction of some direct injury upon the interests of the party against whom the campaign is directed." *Id.*, at 143, 81 S.Ct., at 532-533. The essential character of such a publicity campaign was, we concluded, political, and could not be segregated from the activity's impact on business. Rather, the plaintiff's cause of action simply embraced the inherent possibility in such political fights "that one group or the other will get hurt by the arguments that are made." *Id.*, at 144, 81 S.Ct., at 533. As a political activity, special factors counseled against regulating the publicity campaign under the antitrust laws:

Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions

of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical." *Id.*, 365 U.S., at 140-141, 81 S.Ct., at 531 (footnote omitted).

In *Noerr*, then, the political context and nature of the activity precluded inquiry into its antitrust validity.⁹

Here the context and nature of the activity do not counsel against inquiry into its validity. Unlike the publicity campaign in *Noerr*, the activity at issue here did not take place in the open political arena, where partisanship is the hallmark of decision-making, but within the confines of a private standard-setting process. The validity of conduct within that process has long been defined and circumscribed by the antitrust laws without regard to whether the private standards are likely to be adopted into law. See *supra*, at 1937-1938. Indeed, because private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits, see *ibid.*, the standards of conduct in this context are, at least in some respects, more rigorous than the standards of conduct prevailing in the partisan political arena or in the adversarial process of adjudication. The activity at issue here thus cannot, as in *Noerr*, be characterized as an activity that has traditionally been regulated with extreme caution, see *Noerr, supra*, 365 U.S., at 141, 81 S.Ct., at 531, or as an activity that "bear[s] little if any resemblance to the combinations normally held violative of the Sherman Act," 365 U.S., at 136, 81 S.Ct., at 529. And petitioner did not confine itself to efforts to persuade an independent decisionmaker, compare *id.*, at 138, 139, 81 S.Ct., at 530 (describing the immunized conduct as "mere solicitation"); rather, it organized and orchestrated the

⁹ Similarly in *California Motor Transport* any antitrust review of the validity of the activity at issue was limited and structured by the fact that there the antitrust defendants were "us[ing] the channels and procedures of state and federal agencies and courts." 404 U.S., at 511, 92 S.Ct., at 612; see also *id.*, at 512-513, 92 S.Ct., at 612-613.

actual exercise of the Association's decisionmaking authority in setting a standard. Nor can the setting of the Association's Code be [1941] characterized as merely an exercise of the power of persuasion, for it in part involves the exercise of market power. The Association's members, after all, include consumers, distributors, and manufacturers of electrical conduit, and any agreement to exclude polyvinyl chloride conduit from the Code is in part an implicit agreement not to trade in that type of electrical conduit. Compare *id.* at 136, 81 S.Ct., at 529. Although one could reason backwards from the legislative impact of the Code to the conclusion that the conduct at issue here is "political," we think that, given the context and nature of the conduct, it can more aptly be characterized as commercial activity with a political impact. Just as the antitrust laws should not regulate political activities "simply because those activities have a commercial impact," *id.*, at 141, 81 S.Ct., at 531, so the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact.¹⁰

¹⁰ It is admittedly difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact, and this is itself a case close to the line. For that reason we caution that our decision today depends on the context and nature of the activity. Although criticizing the uncertainty of such a particularized inquiry, *post*, at 1945, the dissent does not dispute that the types of activity we describe *supra*, at 1938-1939, could not be immune under *Noerr* and fails to offer an intelligible alternative for distinguishing those non-immune activities from the activity at issue in this case. Rather, the dissent states without elaboration that the sham exception "is enough to guard against flagrant abuse," *post*, at 1945, apparently embracing the conclusion of the United States Court of Appeals for the Ninth Circuit that the sham exception covers the activity of a defendant who "genuinely seeks to achieve his governmental result, but does so through improper means." *Sessions Tank Liners, Inc. v. Joor Mfg.*, 827 F.2d 458, 465, n. 5 (1987) (emphasis in original). Such a use of the word "sham" distorts its meaning and bears little relation to the sham exception *Noerr* described to cover activity that was not genuinely intended to influence governmental action. 365 U.S., at 144, 81 S.Ct., at 533. See also P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 203.1a, pp. 13-14 (1987 Supp.). More importantly, the Ninth Circuit's ap-

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), is not to the contrary. In that case we held that the First Amendment protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of demands for equality and racial justice. Although the boycotters intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market. *Id.*, 458 U.S., at 914-915, 102 S.Ct., at 3426. Here, in contrast, petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete.¹¹

[1942] Thus in this case the context and nature of petitioner's efforts to influence the Code persuade us that the validity of those efforts must, despite their political impact, be evaluated under the

proach renders "sham" no more than a label courts could apply to activity they deem unworthy of antitrust immunity (probably based on unarticulated consideration of the nature and context of the activity), thus providing a certain superficial certainty but no real "intelligible guidance" to courts or litigants. *Post*, at 1944. Indeed, the Ninth Circuit concluded that the very activity the dissent deems protected was an unprotected "sham." 827 F.2d, at 465.

¹¹ Although the absence of such anticompetitive motives and incentives is relevant to determining whether petitioner's restraint of trade is protected under *Claiborne Hardware*, we do not suggest that the absence of anticompetitive purpose is necessary for *Noerr* immunity. As the dissent points out, in *Noerr* itself the major purpose of the activity at issue was anticompetitive. *Post*, at 1943-1944. Our statement that the "ultimate aim" of petitioner "is not dispositive," *supra* at 1939, stands only for the proposition that, at least outside the political context, the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone *sufficient* to render that activity immune from antitrust liability.

standards of conduct set forth by the antitrust laws that govern the private standard-setting process. The antitrust validity of these efforts is not established, without more, by petitioner's literal compliance with the rules of the Association, for the hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition. An association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards.¹² The issues of immunity in this case thus collapses into the issue of antitrust liability. Although we do not here set forth the rules of antitrust liability governing the private standard-setting process, we hold that at least where, as here, an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.

This conclusion does not deprive state and local governments of input and information from interested individuals or organizations or leave petitioner without ample means to petition those governments. Cf. *Noerr, supra*, 365 U.S., at 137-138, 81 S.Ct., at 529-530. See also *California Motor Transport*, 404 U.S., at 510, 92 S.Ct., at 611-612. Petitioner, and others concerned about the safety or competitive threat of polyvinyl chloride conduit, can, with full antitrust immunity, engage in concerted efforts to influence those governments through direct lobbying, publicity campaigns, and other traditional avenues of political expression. To the extent state and local governments are more difficult to persuade through these other avenues, that no doubt reflects their preference for and confidence in the nonpartisan consensus process that petitioner has undermined. Petitioner remains free to take advantage of the forum provided by the standard-setting process by presenting and vigorously arguing accurate scientific

¹² Even petitioner's counsel concedes, for example, that *Noerr* would not apply if the Association had a rule giving the steel conduit manufacturers a veto over changes in the Code. Tr. of Oral Arg. 41-42.

evidence before a nonpartisan private standard-setting body.¹³ And petitioner can avoid the strictures of the private standard-setting process by attempting to influence legislatures through other forums. What petitioner may not do (without exposing itself to possible antitrust liability for direct injuries) is bias the process by, as in this case, stacking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition.

The judgment of the Court of Appeals is

Affirmed.

Justice WHITE, with whom Justice O'CONNOR joins, dissenting.

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. [1943] 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), held that the Sherman Act should not be construed to forbid joint efforts by railway companies seeking legislation that would disadvantage the trucking industry. These efforts for the most part involved a public relations campaign rather than direct lobbying of the lawmakers and were held not subject to antitrust challenge because of the fundamental importance of maintaining the free flow of information to the government and the right of the people to seek legislative relief, directly or indirectly. *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), and *California Motor Transport Co. v. Trucking*

¹³ The dissent mistakenly asserts that we today hold that *Noerr* immunity does not apply to mere efforts to persuade others to exclude a competitor's product from a private code. See *post*, at 1944-1945. Our holding is expressly limited to cases where an "economically interested party exercises *decisionmaking* authority in formulating a product standard for a private association that comprises market participants." *Supra* this page (emphasis added); see also *supra*, at 1940-1941 (relying in part on the distinction between activity involving the exercise of decisionmaking authority and market power and activity involving mere attempts to persuade an independent decisionmaker). Compare *Noerr*, 365 U.S., at 136, 81 S.Ct., at 529. The dissent also mistakenly asserts that this description encompasses all private standard-setting associations. See *post*, at 1944. In fact, many such associations are composed of members with expertise but no economic interest in suppressing competition. See, e.g., *Sessions*, 827 F.2d, at 460, and n. 2.

Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), applied the rule to efforts to seek executive action and to administrative and adjudicative proceedings.

The Court now refuses to apply the rule of these cases to the participants in those private organizations, such as National Fire Protection Association (NFPA), that regularly propound and publish health and safety standards for a variety of products and industries and then present these codes to state and local authorities for the purpose of having them enacted into law. The NFPA and those participating in the code-writing process will now be subject to antitrust liability if their efforts have anti-competitive effects and do not withstand scrutiny under the rule of reason. Believing that this result is a misapplication of the *Noerr* decision and an improvident construction of the Sherman Act, I respectfully dissent.

This case presents an even stronger argument for immunity than did *Noerr* itself. That decision turned on whether the design or purpose of the conduct was to obtain or influence the passage or enforcement of laws. The Court concedes that petitioner's actions in this case constituted a "genuine effort to influence governmental action," *ante*, at 1938, and that this was its "ultimate aim," *ante*, at 1939. In *Noerr*, the publicity campaign was dispersed widely among the public in a broad but necessary diluted attempt to move public opinion in hopes that government officials would take note and respond accordingly. The campaign apparently had some influence on the passage of tax laws and other legislation favorable to the railroads in New Jersey, New York, and Ohio, and procured the governor's veto of a bill that had been passed in Pennsylvania. See 365 U.S., at 130, 81 S.Ct. at 525-526; see also 155 F.Supp. 768, 777-801 (ED Pa.1957). Here, NFPA actually drafted proposed legislation in the form of the National Electrical Code (NEC) and presented it country-wide. Not only were petitioner's efforts in this case designed to influence the passage of state laws, but there was also a much greater likelihood that they would be successful than was the case in *Noerr*. This is germane because it establishes a much greater likelihood that the "purpose" and "design" of petitioner's actions in this case was the "solicitation of governmental action with

respect to the passage and enforcement of laws," 365 U.S., at 138, 81 S.Ct., at 530.

Rather than directly confronting the severe damage that today's decision does to the *Noerr* doctrine, the majority asserts that the "ultimate aim" of petitioner's efforts "is not dispositive." *Ante*, at 1939. That statement cannot be reconciled with the statements quoted earlier from *Noerr*, where it was held that even if one of the major purposes, or even the *sole* purpose, of the publicity campaign was "to destroy the truckers as competitors," 365 U.S., at 138, 81 S.Ct., at 530, those actions were immunized from antitrust liability because ultimately they were "directed toward obtaining governmental action," *id.*, at 140, 81 S.Ct., at 531. The majority later doubles back on this statement, and suggests that it is important in this case that "petitioner was at least partially motivated by the desire to lessen competition, and . . . stood to reap substantial economic benefits from making it difficult for respondent to compete." *Ante*, at 1942. It need hardly be said that all of this was also true in [1944] *Noerr*. Nobody condones fraud, bribery, or misrepresentation in any form, and other state and federal laws ensure that such conduct is punishable. But the point here is that conduct otherwise punishable under the antitrust laws either becomes immune from the operation of those laws when it is part of a larger design to influence the passage and enforcement of laws, or it does not. No workable boundaries to the *Noerr* doctrine are established by declaring, and then repeating at every turn, that everything depends on "the context and nature of" the activity, *ante*, at 1939, 1940, 1941, if we are unable to offer any further guidance about what this vague reference is supposed to mean, especially when the result here is so clearly wrong as long as *Noerr* itself is reputed to remain good law. One unfortunate consequence of today's decision, therefore, is that district courts and courts of appeals will be obliged to puzzle over claims raised under the doctrine without any intelligible guidance about when and why to apply it.

If there were no private code-writing organizations, and state legislatures themselves held the necessary hearing and wrote codes from scratch, then business concerns like Allied, together with their friends, could jointly testify with impunity about the safety of various products, even though they had anti-competitive

motives in doing so. This much the majority concedes, as it does that the major purpose of the code-writing organizations is to influence legislative action. These days it is almost a foregone conclusion that the vast majority of the states will adopt these codes with little or no change. It is untenable to consider the code-writing process by such organizations as NFPA as too far removed from the legislative process to warrant application of the doctrine announced in *Noerr* and faithfully applied in other cases. This was the view of Judge Sneed and his colleagues on the Ninth Circuit in *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 827 F.2d 458 (1987), and the reasons they gave for applying *Noerr* in this context are much more persuasive than anything to the contrary the majority now has to offer.

The Court's decision is unfortunate for another reason. There are now over 400 private organizations preparing and publishing an enormous variety of codes and standards. State and local governments necessarily, and as a matter of course, turn to these proposed codes in the process of legislating to further the health and safety of their citizens. The code that is at issue in this case, for example, was adopted verbatim by 25 states and the District of Columbia; 19 others adopted it with only minor changes. It is the most widely disseminated and adopted model code in the world today. There is no doubt that the work of these private organizations contributes enormously to the public interest and that participation in their work by those who have the technical competence and experience to do so should not be discouraged.

The Court's decision today will surely do just that. It must inevitably be the case that codes such as NEC will set standards that some products cannot satisfy and hence in the name of health and safety will reduce or prevent competition, as was the case here. Yet, putative competitors of the producer of such products will not think twice before urging in the course of the code-making process that those products not be approved; for if they are successful (or even if they are not), they may well become antitrust defendants facing treble-damages liability unless they can prove to a court and a jury that they had no evil motives but were merely "presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-setting body," *ante* at 1942, (though with the knowing and inevitable result of

eliminating competition). In this case, for example, even if Allied had not resorted to the tactics it employed, but had done no more than successfully argue in good faith the hazards of using respondent's products, it would have inflicted the same damage on respondent and would have risked facing [1945] the same antitrust suit, with a jury ultimately deciding the health and safety implications of the products at issue.

The Court's suggestion that its decision will not affect the ability of these organizations to assist state and local governments is surely wrong. The Court's holding is "that at least where, as here, an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effects the standard has of its own force in the marketplace." *Ante*, at 1942. This description encompasses the structure and work of all such organizations as we now know them. The Court is saying, in effect, that where a private organization sets standards, the participants can be sued under the antitrust laws for *any* effects those standards have in the marketplace *other than* those flowing from their adoption into law. But the standards will have *some* effect in the marketplace even where they are also adopted into law, through publicity and other means, thus exposing the participants to liability. Henceforth, therefore, any private organization offers such standards at its peril, and without any of the breathing room enjoyed by other participants in the political process.

The alternative apparently envisioned by the Court is that an organization can gain the protection of the *Noerr* doctrine as long as nobody with any economic interest in the product is permitted to "exercis[e] decisionmaking authority" (*i.e.*, vote) on its recommendations as to particular product standards. Insisting that organizations like NFPA conduct themselves like courts of law will have perverse effects. Legislatures are willing to rely on such organizations precisely because their standards are being set by those who possess an expert understanding of the products and their uses, which are primarily if not entirely those who design, manufacture, sell, and distribute them. Sanitizing such bodies by

discouraging the active participation of those with economic interests in the subject matter undermines their utility.

I fear that exposing organizations like NFPA to antitrust liability will impair their usefulness by inhibiting frank and open discussion of the health and safety characteristics of new or old products that will be affected by their codes. The Court focuses on the tactics of petitioner that are thought to have subverted the entire process. But it is not suggested that if there are abuses, they are anything more than occasional happenings. The Court does speculate about the terrible practices that applying *Noerr* in this context could lead us to condone in future cases, *ante* at 1938-1939, too, but these are no more than fantasies, since nothing of the sort occurred in the wake of *Noerr* itself. It seems to me that today's decision is therefore an unfortunate case of overkill.

Of course, the *Noerr* immunity is not unlimited and by its terms is unavailable where the alleged efforts to influence legislation are nothing but a sham. As the Ninth Circuit held, this limitation is enough to guard against flagrant abuse. In any event, occasional abuse is insufficient ground to render the entire process less useful and reliable. I would reverse the judgment below and remand for further proceedings.

B-44

Arms Unit

July 1, 1988

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

9/2/87-Opn
DC #CV-84-6363-MRP
Central California

June 27, 1988

Cathy A. Catterson
United States Court of Appeals
for the Ninth Circuit
Post Office Box 547
San Francisco, CA 94101

Re: Sessions Tank Liners, Inc., dba Southwest Tank
Liners, Inc.,
v. Joor Manufacturing, Inc.
No. 87-916
(Your No. 86-6208 86-6470)

Dear Ms. Catterson:

The Court today entered the following order in each of the
above entitled cases:

The petition for a writ of certiorari is granted. The judgment is
vacated and the case is remanded to the United States Court of
Appeals for the Ninth Circuit for further consideration in light of
Allied Tube & Conduit Corporation v. Indian Head, Inc., 486
U.S. ____ (1988).

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

/s/ JOSEPH F. SPANIO, JR.

For Publication
United States Court of Appeals
For the Ninth Circuit
Nos. 86-6208; 86-6470
D.C. No. CV-84-6363-MRP
Sessions Tank Liners, Inc. dba
Southwest Tank Liners, Inc.,
Plaintiff-Appellant,
v.

Joor Manufacturing, Inc., et al.,
Defendants-Appellees.

OPINION

On Remand from the
Supreme Court of the United States
Filed July 22, 1988

Before: Joseph T. Sneed, Robert Boochever and
David R. Thompson, Circuit Judges.
Opinion by Judge Sneed

SUMMARY

Antitrust

The court remanded the case for determining the extent to which appellant has established an antitrust violation on part of appellees under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process.

This case was before this court previously. Upon petitions for writ of certiorari, the petitions were remanded to this court for further consideration in the light of *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. _____. 56 U.S.L.W. 4539 (1988).

[1] The Supreme Court rejected the approach this court adopted in its disposition of this case. The Supreme Court made clear that the efforts of Joor Manufacturing to influence the Western Fire Chiefs Association to amend its fire code must be evaluated under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process. [2] The Supreme Court held that where an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust

liability flowing from the effect that standard has of its own force in the marketplace.

OPINION

SNEED, Circuit Judge:

This case was before this court previously, 827 F.2d 458 (9th Cir. 1987). Petitions for writ of certiorari were filed in the Supreme Court of the United States. These petitions were remanded to us for further consideration in the light of *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. ____ 56 U.S.L.W. 4539 (1988).

[1] After examining *Allied Tube & Conduit Corp.* carefully, it is clear that we must remand this case to the district court for further proceedings. The Supreme Court explicitly rejected the approach this court adopted in its disposition of this case. *Id.* at ____ n.10, 56 U.S.L.W. at 4543 n.10. The Supreme Court has made clear that the context and nature of the efforts of Joor Manufacturing, Inc. to influence the Western Fire Chiefs Association (WFC) to amend its influential fire code must "be evaluated under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process." *Id.* at ____, 56 U.S.L.W. at 4543.

[2] Although the Supreme Court did not establish a bright line rule, it did state:

Although we do not here set forth the rules of antitrust liability governing the private standard-setting process, we hold that at least where, as here, an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.

Id.

It is our belief that further proceedings in the district court are necessary to determine the extent to which Sessions Tank Liners, Inc. has established an antitrust violation on the part of Joor Manufacturing, Inc.

REMANDED.



(4)
No. 87-2086

Supreme Court, U.S.
FILED
OCT 27 1988

JOSEPH E. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

DAVID A. BOONE, *et al.*,
Petitioners,

VS.

REDEVELOPMENT AGENCY OF THE
CITY OF SAN JOSE, *et al.*,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL N. KHOURIE
Counsel of Record

JAMES G. GILLILAND, JR.

MARK T. JANSEN

KHOURIE, CREW & JAEGER, P.C.

One Market Plaza

Spear Street Tower, 40th Floor

San Francisco, CA 94105

Telephone: (415) 777-0333

JOAN R. GALLO

City Attorney

MOLLIE DENT

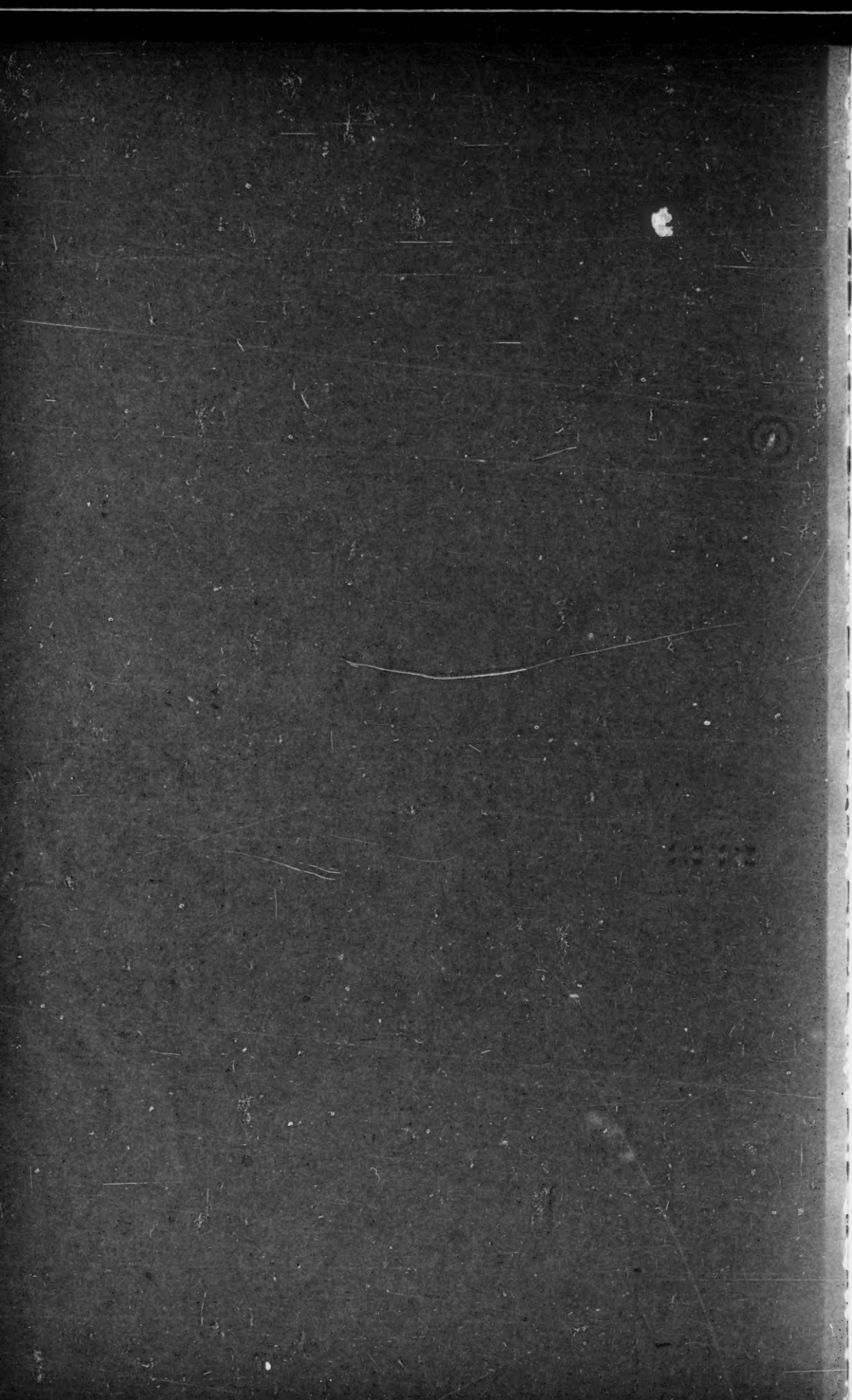
Senior Deputy City Attorney

151 West Mission Street

San Jose, CA 95110

Telephone: (408) 277-4454

*Counsel for Municipal Respondents
Redevelopment Agency of the
City of San Jose and
City of San Jose*



RESTATEMENT OF QUESTIONS PRESENTED

1. Respondents Redevelopment Agency of the City of San Jose and City of San Jose address herein the first issue raised in the Petition for Writ of Certiorari—Can a disappointed commercial developer base a federal antitrust case against a municipality on a claim that the municipality committed procedural errors in the exercise of its authority under state law, where the municipality was acting pursuant to a clearly articulated and affirmatively expressed state policy to replace competition?

2. Respondent Koll Company addresses the second issue raised in the Petition for Writ of Certiorari in its Brief in Opposition to Petition for Writ of Certiorari—Can one competitor base an antitrust case against another competitor solely by alleging a conspiracy with a municipal official, where the activities complained of consist of legitimate lobbying activities on the part of the private competitor, designed to influence municipal action?

CORRECTED LIST OF PARTIES

In their list of parties, petitioners identified Frank Taylor, Executive Director of the Redevelopment Agency of the City of San Jose, as a respondent to this writ petition and a party to the underlying action. This is incorrect. Although petitioners named Mr. Taylor as a defendant in their Second Amended Complaint, he was never served with a summons and complaint and he has not appeared in this action for any purpose, including the filing of municipal respondents' successful motion to dismiss that forms the basis of the pending writ petition.

Donald Goglio, one of the petitioners herein, is incorrectly identified by petitioners as "Arnold" Goglio.

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No. 87-2086

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

DAVID A. BOONE, *et al.*,
Petitioners,

VS.

REDEVELOPMENT AGENCY OF THE
CITY OF SAN JOSE, *et al.*,
Respondents.

**On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit**

MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION

For the reasons set forth below, Respondents Redevelopment Agency of the City of San Jose ("Agency") and the City of San Jose ("City") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit Court of Appeals' opinion in this case. That opinion is reported at 841 F.2d 886.

STATUTES INVOLVED

Petitioners' statement of relevant statutes is incomplete. Evaluation of the applicability of the State Action exemption to the federal antitrust laws requires a review of the entire relevant state statutory scheme, in this case the entire California Community Redevelopment Act, Health & Safety Code sections 33000-33855. The particular state statutes expressly relied upon by the Ninth Circuit Court of Appeals in the opinion below to find that

the State Action exemption applied in this case included Health & Safety Code §§ 33035(a), 33037(a), 33131(a), 33220(d), 33341, 33342 and 33450. 841 F.2d at 890. The district court also relied upon Health & Safety Code sections 33125(c) and 33396. (Pets.' App. B, A-24). Municipal respondents believe that the following additional specific statutes also are relevant: Health & Safety Code §§ 33367, 33368, 33450-33458, 33500 and 33501. The particular statutes cited above are included in municipal respondents' appendix, pp. A-1 through A-13.

STATEMENT OF THE CASE

The Court of Appeals succinctly stated the facts involved in this case in Part I of its opinion. 841 F.2d at 889. In brief, this case involves a decision by the Agency and City not to construct a multi-story parking garage at a certain location in downtown San Jose but, rather, at another location, two blocks away.

The events giving rise to this case began in 1975 when the Agency adopted its 20-year redevelopment plan for the downtown Pueblo Uno Redevelopment Area (the "Plan"). (Petitioners' SAC paras. 12, A-40).¹ At that time the City made the finding that the Pueblo Uno area was "blighted," as required by state law, Cal. Health & Safety Code section 33367. (Pets.' App. V, B-13). The Agency then took necessary intermediary acts to implement the redevelopment plan. It approved a master plan designating land uses, budgeted funds, and negotiated and entered agreements with private developers, including petitioners here, for construction of discreet development projects conforming with the Plan. (E.g., SAC paras. 18-20, 22-23).

During 1982-1983 the Agency concluded that the public interest and the goal of redevelopment would be served best by constructing automobile parking structures at the periphery, not the center, of the Pueblo Uno Redevelopment Area (the

¹ The only pertinent pleading below, petitioners' Second Amended Complaint, will be referred to hereafter as "SAC". Petitioners have provided the Court with a copy of the SAC at their Appendix C, beginning at A-33.

"Area"). The City-owned parking previously located across the street from petitioners' office tower was therefore moved to a different site, two blocks away.

This change to the redevelopment program was accomplished by an amendment to the original Plan, condemnation of some contiguous privately-held property, and subsequent sale to the selected private developer (respondent Koll Company). Accordingly, following a public disclosure and comment period beginning in October, 1982 (SAC para. 36), the Agency amended the plan in December, 1983, to redesignate land use and authorize the use of condemnation (the "Amended Plan"). (*Id.*, paras. 47-51).

Petitioners did not challenge the propriety of the amendment, as provided by the state regulatory scheme, Health & Safety Code sections 33500-501. Following eminent domain proceedings acquired land was conveyed to, and developed as provided for in the Amended Plan, by Koll. (SAC paras. 51, 56).

Petitioners alleged that they constructed an office building in downtown San Jose with the understanding that the City would provide them with parking in the proposed downtown parking garage, and as a result petitioners did not construct adequate on-site parking. 841 F.2d at 889; *Pets.*' App. A-5. Petitioners also alleged that in return for not protesting the amendment to the plan, unnamed city officials promised to reserve a section of the relocated municipal parking structure for petitioners' exclusive use. *Id.* These are the alleged anticompetitive acts of which petitioners complain.

The district court and court of appeals found that the alleged anticompetitive acts of respondents City and Agency were clearly authorized and contemplated by the state authorizing statute. 841 F.2d at 890-91; *Pets.*' App. B, at A-24-26. Therefore, the courts found that the acts were not subject to attack in the federal courts under the Sherman Antitrust Act. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 25 (1985); *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 1079, 87 L.Ed. 315 (1943).

REASONS WHY THIS PETITION FOR WRIT OF CERTORARI SHOULD BE DENIED

The Ninth Circuit Court of Appeals, in its opinion below, was completely faithful to both the rationale and guidelines established by this Court for evaluating applicability of the State Action immunity. Recent decisions of this Court set forth in detail the objective, limited analysis to be applied by the federal courts in determining whether the State Action immunity applies. Thus, no general benefit will be provided by examining the narrow, fact-specific questions posed by petitioners. Nor does the decision below in any way conflict with the decision of any other federal court of appeals. To the contrary, all other courts of appeals that have explored similar issues have reached the identical conclusion.

Further, petitioners have no chance of ultimate success on the merits. Their underlying complaint discloses that they have no antitrust injury and therefore lack standing. Additionally, the very theory on which they proceed—the contention that continued redevelopment was improper because urban “blight” had been eliminated through “private enterprise action alone”—is wholly antithetical to the alleged promise of city-provided parking they seek to enforce by their underlying action.

ARGUMENT

I

THE OPINION BELOW IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT AND THE OTHER FEDERAL COURTS OF APPEALS

A. The State Action Doctrine Exempts From The Sherman Act The Municipal Respondents’ Conduct Pursuant To The Urban Redevelopment Laws Of The State Of California

This Court, in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), considered whether the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.*, prohibited the anticompetitive actions of a state or its agents taken in accordance with state law. Relying on principles of federalism and state sovereignty embodied in the

federal constitution, the Court refused to find in the Sherman Act “an unexpressed purpose to nullify a state’s control over its officers and agents.” *Id.* at 351 63 S.Ct. at 313. The concerns of federalism and preservation of the states’ sovereignty have been repeatedly affirmed by the Court during the subsequent four decades. *See, e.g., Patrick v. Burget*, ____ U.S. ____, 108 S.Ct. 1658 (1988); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 25 (1985), *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985); *Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984). When it rendered the decision below, the Ninth Circuit Court of Appeals faithfully applied the standards of review set out by this Court, and protected the federalism and state sovereignty concerns first expressed in *Parker*.²

This Court’s recent State Action decisions have strictly limited the federal court’s review of challenged conduct of a state or municipality taken pursuant to authorizing state legislation. The antitrust laws do not apply to municipal action if an objective analysis of the state’s authorizing legislation “evidences a ‘clearly articulated and affirmatively expressed’ state policy to displace competition with regulation” in the particular area of municipal conduct. *Hallie v. Eau Claire*, *supra*, 471 U.S. at 44, 105 S.Ct. at 1719.

The Ninth Circuit Court of Appeals faithfully applied the analytical framework and policy guidelines provided by *Hallie* in reaching the decision below. The court of appeals, like the district court whose ruling it affirmed, examined municipal respondents’

² Although the court of appeals analyzed petitioners’ allegations against Koll under the Noerr-Pennington doctrine, it is clear that petitioners cannot escape application of the State Action doctrine by merely suing Koll, the private party who cooperated with the City and Agency in furtherance of the redevelopment program. *United States v. Southern Motor Carriers Rate Conference*, 471 U.S. 56, 105 S.Ct. 1721 (1985); *Cine 42nd Street Theatre Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1048 (2d Cir. 1986); *L & HS Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517, 522 (8th Cir. 1985); *see also Mercy Peninsula Ambulance Co. v. San Mateo Co.*, 791 F.2d 755, 759 (9th Cir. 1986).

alleged actions against the broad redevelopment authority granted by the state Community Redevelopment Act, Cal. Health & Safety Code §§ 33000-33855. 841 F.2d at 889-891. The court of appeals found that California law provides local governments broad powers to engage in acts which are clearly anticompetitive to combat the "serious and growing menace" created by blighted areas (Health & S.C. § 33035(a)), and had affirmatively expressed the goal of eliminating blight "through the employment of all appropriate means" (*id.*, § 33037(a)). 841 F.2d at 890.

As the court of appeals properly concluded, this comprehensive statute clearly expresses "a legislative intent to displace the free market with state regulation." 841 F.2d at 891.³ In fact, as the court below correctly recognized, the anticompetitive acts specifically authorized and contemplated by the California redevelopment law—amendment of the redevelopment plan to redesignate authorized uses, condemnation of land within the redevelopment area and its sale to a competing commercial developer for improvement—are precisely the types of activities that the petitioners' complaint challenges. *Id.* at 890.

The holding and analysis of the Ninth Circuit conforms with all other federal courts of appeals that have considered whether state-authorized municipal land use planning, zoning and related redevelopment activities are exempt from antitrust scrutiny. In fact, all of the lower federal courts that have considered this particular type of municipal regulation have held that similar state redevelopment or zoning statutes express an intent by the legislature to authorize clearly anticompetitive results, including municipalities' agreements to subsidize private renewal projects by supplying developers a protected economic position. *See, e.g., Cine 42nd Street Theatre Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032 (2d Cir. 1986); *Racetrac Petroleum, Inc. v. Prince George's County*, 786 F.2d 202 (4th Cir. 1986), *aff'g* 601 F.Supp. 892 (D.Md. 1985); *LaSalle National Bank v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985), *cert. denied*, ____ U.S. ____, 106

³ Petitioners themselves admit the state law grants "essentially limitless" authority for the City and Agency "to do *anything* to redevelop blighted areas" (Pet. at 2, emphasis in original).

S.Ct. 2892, 90 L.Ed. 2d 979 (1986); *Scott v. Sioux City*, 736 F.2d 1207 (8th Cir. 1984), *cert. denied*, 471 U.S. 1003, 105 S.Ct. 1864, 85 L.Ed.2d 158 (1985); *Russell v. Kansas City*, 690 F.Supp. 947, 953-54 (D.Kan. 1988); *Vartan v. Harristown Dev. Corp.*, 655 F.Supp. 430 (M.D.Pa. 1987), *aff'd*, 838 F.2d 1206, 1208 (3d Cir. 1988); *Price v. Fort Pierce*, 625 F.Supp. 979, 981 (S.D. Fla. 1986); *Reasor v. Norfolk*, 606 F.Supp. 788, 793-796 (E.D.Va. 1984).

B. This Case Merely Presents Allegations Of Procedural Errors Under State Law, Which Are Not Subject To Review Under The Sherman Act

Petitioners have distorted the record below in an attempt to present the Court with a question worthy of its attention. But no such broad question exists. Petitioners invite the Court to reconsider the question whether a municipality's anticompetitive activities fall within the State Action exemption to the federal antitrust laws "when those activities are *expressly prohibited* by the state, which affirmatively does not authorize the displacement of competition and instead seeks action by unfettered competition." (Pets.' "Question Presented"). However, the real question before the court of appeals, and therefore before this Court, is a much narrower, parochial one, namely the interpretation of the particular California urban redevelopment statutes to determine whether the allegedly anticompetitive municipal activity in fact was contemplated by the statute. That question was answered correctly by the Ninth Circuit in the decision below.

The circuit court explicitly applied a two-part inquiry in determining whether State Action immunity applied to the facts alleged by petitioners:

We must first determine *whether the California legislature authorized the challenged actions* of the city and the agency. Then we must determine whether the legislature intended to displace competition with regulation. Both elements are prerequisites to proper application of the state action exception to municipal action.

841 F.2d at 890 (emphasis added). The court then examined the statute against the alleged municipal activity and properly con-

cluded that the acts challenged by petitioner "are *clearly and affirmatively authorized* by the California legislature." *Id.* (emphasis added). In other words, petitioners have purposefully ignored the express determination of the court of appeals in order to deceptively create the *appearance* of both (1) abuse by the lower court and (2) a question of broad social and judicial interest.

This Court has clearly delineated the level of antitrust scrutiny that federal courts may constitutionally apply to municipal action. That scrutiny is limited to an objective determination whether the state authorizing statutes relied on "evidence a 'clearly articulated and affirmatively expressed' state policy to displace competition with regulation" in a particular area, showing that "'the legislature contemplated the kind of action complained of.'" *Hallie, supra*, 471 U.S. at 44, 105 S.Ct. at 1719 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415, 98 S.Ct. 1123, 1138, 556 L.Ed.2d 364 (1978)).

The contended procedural irregularities and other state law violations on which petitioners rely are matters best reviewed by the California state courts, which have both the jurisdiction to review administrative errors by municipal agencies and are well-suited to interpret the state's statutory schemes. As the Ninth Circuit recognized in the opinion below, decisions made by municipalities acting under the California redevelopment law are reviewable in state court. 841 F.2d at 886. *See, Berggren v. Moore*, 61 Cal.2d 347, 38 Cal.Rptr. 722, 392 P.2d 522 (1964); *Kehoe v. City of Berkeley*, 67 Cal.App.3d 666, 135 Cal.Rptr. 700 (1977); *Babcock v. Community Redev. Agency*, 148 Cal.App.2d 38, 306 P.2d 513 (1957); *see also, Johnson v. Redevelopment Agency of City of Oakland*, 317 F.2d 872 (9th Cir.), *cert. denied*, 375 U.S. 915, 84 S.Ct. 216, 11 L.Ed.2d 154 (1963); *Emmington v. Solano County Redevelopment Agency*, 195 Cal.App.3d 491, 237 Cal.Rptr. 636 (1987). Health and Safety Code Section 33501 expressly provides that the state superior courts may be petitioned to determine the "validity of a redevelopment plan," including "the legality and validity of all proceedings theretofore taken" as well as the redevelopment agency's "authority to transact business and exercise its powers." Thus, petitioners clearly had recourse to

the state courts to bring any argument that the Agency had improperly amended the plan in December 1983 or had lost its authority to act because blight had been eliminated.⁴

Given the adequate remedies available in the state courts, it would be especially unwise and improper for the federal courts to become embroiled in detailed fact finding or interpretation of state regulatory statutes as a prelude to application of the federal antitrust laws. *Parker* and its progeny clearly require that the federal courts leave complaints of administrative "abuse" or procedural error to the state courts once they have answered affirmatively the initial objective question whether the "anticompetitive effects [complained of] logically would result from [the] broad authority to regulate." *Hallie, supra*, at 42, 105 S.Ct. at 1718. Otherwise, requiring "such a close examination of a state legislature's intent . . . would be undesirable . . . because it would embroil the federal courts in the *unnecessary interpretation of state statutes*." *Id.* at 44 n.7, 105 S.Ct. at 1719 (emphasis added).

All of the circuit courts that have addressed the issue also have recognized that the principles enunciated in *Parker* require the courts to abstain from making more than a limited objective inquiry into whether the anticompetitive results complained of were anticipated and authorized by the legislature. *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9, 13-14 (1st Cir. 1987); *Hancock Industries v. Schaeffer*, 811 F.2d 225, 234-236 (3d Cir. 1987); *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985); *Euster v. Eagle Downs Racing Association*, 677 F.2d 992 (3d Cir.), *cert. denied*, 459 U.S. 1022, 103 S.Ct. 388, 74

⁴ Petitioners complain in their Supplemental Brief and elsewhere that the state trial court, too, has been persuaded that they cannot state a claim for declaratory relief, equitable estoppel (to enforce the alleged "assurances" of parking) or inverse condemnation. (Supp. Pet. at 8; Pets.' App. III, p. B-8-10). Of course, the fact that the state court found their *fourth* amended complaint *in that court* deficient on a *multitude* of grounds (*id.* at p. B-9, B-10, sustaining demurrer for *each* of the reasons listed), does not negate the availability of state court review for deserving plaintiffs with legitimate complaints. Rather, petitioners' failure in *both* the federal and state courts confirms the general meritlessness of their case.

L.Ed.2d 519 (1982). Most recently, in *Lease Lights, Inc. v. Public Service Elec. & Gas. Co.*, 849 F.2d 1330, 1334 (10th Cir. 1988), the Tenth Circuit recognized that even the "constitutional invalidity of the attempted state regulations is not an appropriate basis for disregarding state action immunity." See also, *Scott v. Sioux City*, *supra*, 736 F.2d at 1215-16, *cert. denied*, 469 U.S. 1003, 105 S.Ct. 1864; *Vartan v. Harristown Dev. Corp.*, *supra*, 655 F.Supp. at 435-437 (M.D.Pa. 1987), *aff'd*, 838 F.2d 1206, 1208 (3d Cir. 1988); *City Communication, Inc. v. City of Detroit*, 660 F.Supp. 932, 935 n.3 (E.D.Mich. 1987).⁵

II

THE DECISION BELOW IS CORRECT ON GROUNDS OTHER THAN THE STATE ACTION DOCTRINE

Aside from the issue of the applicability of the State Action exemption under the facts alleged, petitioners are without hope of succeeding on their antitrust theories at trial. Ignoring for the present the fact that petitioners would be unable to prove any of

⁵ As discussed above, under *Hallie*, the federal courts should refrain from detailed review of states' procedural requirements. However, municipal respondents in fact complied with all procedural requirements in amending the Plan in December 1983. The California Community Redevelopment Act required the Agency to make eight specific findings of fact, including a finding of blight, when it *initially adopted* the Plan in 1975. Cal. Health & S.C. § 33367(d)(1)-(8). A separate provision of the Act, sections 33450-33458, authorizes and governs the procedures for the *amendment* of redevelopment plans. Section 33457.1 requires only limited findings in conjunction with plan amendments. The statute provides that the findings required by section 33367(d) need be made only "[t]o the extent warranted by [the] proposed amendment." The purpose of the December, 1983 Plan amendment was to authorize the Agency's use of condemnation to complete the redevelopment process. Consequently, the only additional finding both required by section 33367 and "warranted" by the proposed amendment was the finding that "the condemnation of real property . . . is necessary to the execution of the redevelopment plan." Health & S.C. § 33367(d)(6). This finding was made. (Pets.' App. VI, B-15). Thus, a renewed finding of blight was not required by state law in this case.

the misconduct or purported promises and assurances on which they allegedly relied,⁶ petitioners' own complaint shows at least two disabling infirmities.

First, petitioners' complaint clearly discloses that they have not suffered antitrust injury necessary for standing to bring a claim. It is established beyond dispute that the antitrust laws exist to protect competition, not particular competitors. *Cargill, Inc. v. Monfort of Colorado, Inc.*, ____ U.S. ____, 107 S.Ct. 484, 492, 93 L.Ed.2d 427, 439 (1986); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697 (1977). Consequently, to amount to an antitrust violation, defendants' conduct must harm competition itself, not merely plaintiff "in its capacity as a competitor." *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983); *Gough v. Rossmoor*, 585 F.2d 381, 386 (9th Cir.), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280 (1978). To show injury of the type the antitrust laws were intended to prevent, petitioners must show their injury "was caused by a reduction, rather than an increase, in competition flowing from the defendant's acts." *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 732 (9th Cir. 1979).

Here the thrust of petitioners' claim is that because of City action they now face *too much* competition. Petitioners admit that without the Koll project their building would command a 50% share of the market for commercial office space in the Pueblo Uno Redevelopment Project. (SAC para. 20). Without Koll, petitioners would be over twice the size of their next largest competitors. (*Id.*) Petitioners are building the largest building in San Jose. (*Id.*, para. 29). Without competition from Koll they could dominate the market. With the Koll building petitioners face much more competition. Adding Koll's 244,000 square feet of competing space (SAC para. 51), petitioners' share of the Pueblo Uno market falls to 35% and it is only 30% larger than its

⁶ Both the state court and the unappealed-from portion of the Ninth Circuit decision affirming dismissal of petitioners' civil rights claims held that the "promises" and "assurances" of parking allegedly relied on are unenforceable as a matter of law. (Pets.' App. III, B-10; 841 F.2d at 893).

nearest competitor—Koll. Thus the City, by inducing Koll to enter the market, has increased competition. This increased competition may mean petitioners' profits will be less handsome than they otherwise would have been, but it surely does not mean that the law intended to preserve competition—the Sherman Act—has been violated.

Another serious flaw in petitioners' case is the inherent contradiction they created in their strained effort to plead around the State Action exemption. The Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36, allows only injunctive relief against municipalities. Subsequently, the only remedy petitioners seek is an order forcing the City and Agency to provide allegedly promised parking. But the essential premise of petitioners' misguided attempt to skirt the State Action exemption is (1) that the purpose of the Plan, *ab initio*, was to redevelop the Area through private enterprise acting alone, without public subsidies; and (2) that renewal efforts up through 1982 or 1983 had eliminated blight by private enterprise acting alone without public assistance. These allegations are completely inconsistent with petitioners' allegation that their commercial development was (and remains) unviable without the subsidization—in the form of a grant of public parking—they would have the federal courts require municipal respondents to provide.

These are just two of the inherent flaws in petitioners' case. They provide further reasons why this Court should deny the writ of certiorari.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

DATED: October 26, 1988

Respectfully submitted,

MICHAEL N. KHOURIE
JAMES G. GILLILAND, JR.
MARK T. JANSEN
KHOURIE, CREW & JAEGER, P.C.

JOAN R. GALLO
City Attorney
MOLLIE DENT
Senior Deputy City Attorney
*Counsel for Municipal
Respondents
City of San Jose
and Redevelopment
Agency of the
City of San Jose*



Appendix

Statutes

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APPENDIX

Statutes

California Community Redevelopment Act

California Health & Safety Code Sections 33000, et. seq.

Selected Provisions

§ 33035. Public injury from blighted area

It is further found and declared that:

(a) The existence of blighted areas characterized by any or all of such conditions constitutes a serious and growing menace which is condemned as injurious and inimical to the public health, safety, and welfare of the people of the communities in which they exist and of the people of the State.

(b) Such blighted areas present difficulties and handicaps which are beyond remedy and control solely by regulatory processes in the exercise of police power.

(c) They contribute substantially and increasingly to the problems of, and necessitate excessive and disproportionate expenditures for, crime prevention, correction, prosecution, and punishment, the treatment of juvenile delinquency, the preservation of the public health and safety, and the maintaining of adequate police, fire, and accident protection and other public services and facilities.

(d) This menace is becoming increasingly direct and substantial in its significance and effect.

(e) The benefits which will result from the remedying of such conditions and the redevelopment of blighted areas will accrue to all the inhabitants and property owners of the communities in which they exist.

(Added by Stats.1963, c. 1812, p. 3680, § 3.)

§ 33037. Declaration of state policy

For these reasons it is declared to be the policy of the State:

(a) To protect and promote the sound development and redevelopment of blighted areas and the general welfare of the inhabitants of the communities in which they exist by remedying such injurious conditions through the employment of all appropriate means.

(b) That whenever the redevelopment of blighted areas cannot be accomplished by private enterprise alone, without public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, in the work of clearance, and in the making of improvements necessary therefor, it is in the public interest to employ the power of eminent domain to advance or expend public funds for these purposes, and to provide a means by which blighted areas may be redeveloped or rehabilitated.

(c) That the redevelopment of blighted areas and the provisions for appropriate continuing land use and construction policies in them constitute public uses and purposes for which public money may be advanced or expended and private property acquired, and are governmental functions of state concern in the interest of health, safety, and welfare of the people of the State and of the communities in which the areas exist.

(d) That the necessity in the public interest for the provisions of this part is declared to be a matter of legislative determination.

(Added by Stats.1963, c. 1812, p. 3680, § 3.)

§ 33125. Lawsuits; seal; contracts; bylaws and regulations

An agency may:

(a) Sue and be sued.

(b) Have a seal.

(c) Make and execute contracts and other instruments necessary or convenient to the exercise of its powers.

(d) Make, amend, and repeal bylaws and regulations not inconsistent with, and to carry into effect, the powers and purposes of this part.

(Added by Stats.1963, c. 1812, p. 3684, § 3.)

§ 33131. Plans; dissemination of information; applications for federal programs and grants

An agency may:

(a) From time to time prepare and carry out plans for the improvement, rehabilitation, and redevelopment of blighted areas.

(b) Disseminate redevelopment information.

(c) Prepare applications for various federal programs and grants relating to housing and community development and plan and carry out such programs within authority otherwise granted by this part, at the request of the legislative body.

(Added by Stats.1963, c. 1812, p. 3685, § 3. Amended by Stats.1969, c. 1561, p. 3167, § 1.)

§ 33220. Powers of public bodies

For the purpose of aiding and co-operating in the planning, undertaking, construction or operation of redevelopment projects located within the area in which it is authorized to act, any public body, upon the terms and with or without consideration as it determines, may:

(a) Dedicate, sell, convey, or lease any of its property to a redevelopment agency.

(b) Cause parks, playgrounds, recreational, community, educational, water, sewer or drainage facilities, or any other works which it is otherwise empowered to undertake, to be furnished adjacent to or in connection with redevelopment projects.

(c) Furnish, dedicate, close, vacate, pave, install, grade, re-grade, plan, or replan streets, roads, roadways, alleys, sidewalks, or other places which it is otherwise empowered to undertake.

(d) Plan or replan, zone or rezone any part of such area and make any legal exceptions from building regulations and ordinances.

(e) Enter into agreements with the federal government, an agency, or any other public body respecting action to be taken pursuant to any of the powers granted by this part or any other law; such agreements may extend over any period, notwithstanding any law to the contrary.

§ 33341. Bonds; expenditure of proceeds; repayment

Redevelopment plans may provide for the agency to issue bonds and expend the proceeds from their sale in carrying out the redevelopment plan. If such an issuance is provided for, the redevelopment plan shall also contain adequate provision for the payment of principal and interest when they become due and payable.

(Added by Stats.1963, c. 1812, p. 3691, § 3.)

§ 33342. Acquisition of real property

Redevelopment plans may provide for the agency to acquire by gift, purchase, lease, or condemnation all or part of the real property in the project area.

(Added by Stats.1963, c. 1812, p. 3691, § 3.)

§ 33367. Contents of ordinance adopting plan*

The ordinance shall contain:

(a) The purposes and intent of the legislative body with respect to the project area.

(b) The plan incorporated by reference.

(c) A designation of the approved plan as the official redevelopment plan of the project area.

(d) The findings and determinations of the legislative body that:

(1) The project area is a blighted area, the redevelopment of which is necessary to effectuate the public purposes declared in this part.

* As statute read in 1983.

(2) The redevelopment plan would redevelop the area in conformity with this part and in the interests of the public peace, health, safety, and welfare.

(3) The adoption and carrying out of the redevelopment plan is economically sound and feasible.

(4) The redevelopment plan conforms to the general plan of the community.

(5) The carrying out of the redevelopment plan would promote the public peace, health, safety, and welfare of the community and would effectuate the purposes and policy of this part.

(6) The condemnation of real property, if provided for in the redevelopment plan, is necessary to the execution of the redevelopment plan and adequate provisions have been made for payment for property to be acquired as provided by law.

(7) The agency has a feasible method or plan for the relocation of families and persons displaced from the project area, if the redevelopment plan may result in the temporary or permanent displacement of any occupants of housing facilities in the project area.

(8) There are or are being provided in the project area or in other areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and persons displaced from the project area, decent, safe, and sanitary dwellings equal in number to the number of and available to such displaced families and persons and reasonably accessible to their places of employment.

(9) All noncontiguous areas of a project area are either blighted or necessary for effective redevelopment and are not included for the purpose of obtaining the allocation of taxes from such area pursuant to Section 33670 without other substantial justification for their inclusion.

(10) Inclusion of any lands, buildings, or improvements which are not detrimental to the public health, safety, or welfare is necessary for the effective redevelopment of the area of which they are a part; that any such area included is necessary for

effective redevelopment and is not included for the purpose of obtaining the allocation of tax increment revenues from such area pursuant to Section 33670 without other substantial justification for its inclusion.

(11) The elimination of blight and the redevelopment of the project area could not be reasonably expected to be accomplished by private enterprise acting alone without the aid and assistance of the agency.

(e) A statement that the legislative body is satisfied permanent housing facilities will be available within three years from the time occupants of the project area are displaced and that pending the development of such facilities there will be available to such displaced occupants adequate temporary housing facilities at rents comparable to those in the community at the time of their displacement.

(f) When the project is financed in part or in whole from revenues derived from the allocation of taxes pursuant to Section 33670, a statement that the legislative body is convinced that the effect of tax increment financing will not cause a severe financial burden or detriment on any taxing agency deriving revenues from a tax increment project area.

(Amended by Stats.1976, c. 1336, p. 5056, § 9.)

§ 33368. Finality of decision; conclusive presumptions; applicability of section

The decision of the legislative body shall be final and conclusive, and it shall thereafter be conclusively presumed that the project area is a blighted area as defined by Sections 33031 or 33032 and that all prior proceedings have been duly and regularly taken.

This section shall not apply in any action questioning the validity of any redevelopment plan, or the adoption or approval of such plan, or any of the findings or determinations of the agency or the legislative body in connection with such plan brought pursuant to Section 33501 within the time limits prescribed by Section 33500.

§ 33396. Acceptance of surplus real property; disposition; funds

An agency at the request of the legislative body of the community may accept a conveyance of real property (located either within or outside a survey area) owned by a public entity and declared surplus by the public entity, or owned by a private entity.

The agency may dispose of such property to private persons or to public or private entities, by sale or long-term lease for development. All or any part of the funds derived from the sale or lease of such property may at the discretion of the legislative body of the community be paid to the community, or to the public entity from which any such property was acquired.

(Added by Stats.1965, c. 1553, p. 3625, § 1. Amended by Stats.1969, c. 1561, p. 3168, § 4.)

Article 12

AMENDMENT OF REDEVELOPMENT PLANS

Sec.

- 33450. Authority to amend; recommendation.
- 33451. Hearing by agency on proposed amendment.
- 33452. Notice of hearing; publication; contents; mailing.
- 33453. Submission of recommended changes to planning commission; waiver.
- 33454. Hearing by legislative body on proposed changes.
- 33455. Recommended changes; submission to planning commission; report; waiver; amending ordinance.
- 33456. Recordation.
- 33457. Transmittal of copy of ordinance to tax officials.
- 33457.1. Findings; availability of reports and information.
- 33458. Joint public hearing on proposed amendment; notice; procedure.

Article 12 was added by Stats.1963, c. 1812, p. 3701, § 3.

§ 33450. Authority to amend; recommendation

If at any time after the adoption of a redevelopment plan for a project area by the legislative body, it becomes necessary or desirable to amend or modify such plan, the legislative body may by ordinance amend such plan upon the recommendation of the agency. The agency recommendation to amend or modify a redevelopment plan may include a change in the boundaries of the project area to add land to or exclude land from the project area. Except as otherwise provided in Section 33378, the ordinance shall be subject to referendum as prescribed by law for the ordinances of the legislative body.

(Amended by Stats.1977, c. 797, p. 2446, § 11.)

§ 33451. Hearing by agency on proposed amendment

Before recommending amendment of the plan the agency shall hold a public hearing on the proposed amendment.

(Added by Stats.1963, c. 1812, p. 3701, § 3.)

§ 33452. Notice of hearing; publication; contents; mailing

Notice of such hearing shall be published pursuant to Section 6063 of the Government Code prior to the date of hearing in a newspaper of general circulation, printed and published in the community, or, if there is none, in a newspaper selected by the agency. The notice of hearing shall include a legal description of the boundaries of the project area by reference to the description recorded with the county recorder pursuant to Section 33373 and of the boundaries of the land proposed to be added to the project area, if any, and a general statement of the purpose of the amendment. Copies of the notices shall be mailed to the last known assessee of each parcel of land not owned by the agency within such boundaries, at his last known address as shown on the last equalized assessment roll of the county; or where a city assesses, levies, and collects its own taxes, as shown on the last equalized assessment roll of the city; or to the owner of each parcel of land within such boundaries as such ownership is shown on the records of the county recorder 30 days prior to the date the notice is published, and to persons, firms, or corporations which have acquired property within such boundaries from the agency,

at his last known address as shown by the records of the agency. Copies of the notices shall also be mailed to the governing body of each of the taxing agencies which levies taxes upon any property in the project area designated in the redevelopment plan as proposed to be amended. The notice shall be mailed by certified mail with return receipt requested.

§ 33453. Submission of recommended changes to planning commission; waiver

If after the public hearings the agency recommends substantial changes in the plan which affect the general plan adopted by the planning commission or the legislative body, such changes shall be submitted to the planning commission for its report and recommendation to the legislative body within 30 days after such submission. If the planning commission does not report upon the changes within 30 days after its submission by the agency, the planning commission shall be deemed to have waived its report and recommendations concerning such changes.

§ 33454. Hearing by legislative body on proposed changes

After receiving the recommendation of the agency concerning such changes in the plan, and not sooner than 30 days after the submission of changes to the planning commission, the legislative body shall hold a public hearing on the proposed amendment, notice of which hearing shall be published in a newspaper in the manner and at the times designated above for notice of hearing by the agency.

(Added by Stats.1963, c. 1812, p. 3701, § 3.)

§ 33455. Recommended changes; submission to planning commission; report; waiver; amending ordinance

After receiving the recommendation of the agency concerning such changes in the plan, the legislative body upon further recommendation by the agency, without additional agency public hearing, may make further changes, including changes in area or boundaries to exclude land from the project area, for consideration at the public hearing. If such changes are substantial changes in the plan which affect the master or community plan adopted by the planning commission or the legislative body, such changes shall be submitted to the planning commission for its report and recommendation to the legislative body within 30 days after such submission. If the planning commission does not report upon the changes within 30 days after its submission by the legislative body, the planning commission shall be deemed to have waived its report and recommendation concerning the changes. If after the public hearing the legislative body determines that the amendments in the plan, proposed by the agency, or the further recommended changes by the agency are necessary or desirable, the legislative body shall adopt an ordinance amending the ordinance adopting the plans thus amended. The legislative body shall consider any proposed changes at a public hearing reopened for that limited purpose.

(Added by Stats.1963, c. 1812, p. 3701, § 3. Amended by Stats.1965, c. 1665, p. 3787, § 39; Stats.1967, c. 1242, p. 3017, § 9.5.)

§ 33456. Recordation

Amendments to a plan adopted pursuant to this article may be recorded in compliance with Section 27295 of the Government Code as promptly as practicable following adoption by the legislative body.

(Added by Stats.1963, c. 1812, p. 3701, § 3. Amended by Stats.1967, c. 1242, p. 3018, § 10.)

§ 33457. Transmittal of copy of ordinance to tax officials

After the amendment of a redevelopment plan to add the provision permitted by Section 33670, or to increase or reduce the

size of the project area, the clerk of the community shall transmit a copy of the ordinance amending the plan, a description of the annexed or detached land within the project area and a map or plat indicating the amendments to the redevelopment plan, to the following parties:

(1) The auditor and assessor of the county in which the project is located;

(2) The officer or officers performing the functions of the auditor or assessor for any taxing agencies which, in levying or collecting taxes, do not use the county assessment roll or do not collect taxes through the county;

(3) The governing body of each of the taxing agencies which levies taxes upon any property in the project area; and

(4) The State Board of Equalization.

Such documents shall be transmitted within 30 days following the adoption of the amended redevelopment plan. The legal effect of such transmittal shall be as set forth in Section 33674.

(Amended by Stats.1978, c. 1112, p. 3387, § 3.)

§ 33457.1. Findings; availability of reports and information

To the extent warranted by a proposed amendment to a redevelopment plan, (1) the ordinance adopting an amendment to a redevelopment plan shall contain the findings required by Section 33367 and (2) the reports and information required by Section 33352 shall be prepared and made available to the public prior to the hearing on such amendment.

(Added by Stats.1977, c. 797, p. 2446, § 12.)

§ 33458. Joint public hearing on proposed amendment; notice; procedure

As an alternative to the separate public hearing required by Sections 33451 and 33454, the agency and the legislative body, with the consent of both, may hold a joint public hearing on the proposed amendment. The presiding officer of the legislative body shall preside over such joint public hearing. Prior to such joint public hearing, the agency shall submit the proposed changes to the planning commission as provided in Section 33453. Notice of

the joint public hearing shall conform to all requirements of Section 33452. The joint public hearing shall thereafter proceed by the same requirements as are provided in Sections 33450 and 33454 to 33455, inclusive.

When a joint public hearing is held where the legislative body is also the agency, the legislative body may adopt the amended plan with no actions necessary by the agency, even as to the recommendations required of the agency by Sections 33454 and 33455.

(Added by Stats.1967, c. 1242, p. 3018, § 11.5.)

Chapter 5 LEGAL ACTIONS

§ 33500. Limitation of actions

No action attacking or otherwise questioning the validity of any redevelopment plan, or amendment to a redevelopment plan, or the adoption or approval of such plan, or amendment, or any of the findings or determinations of the agency or the legislative body in connection with such plan shall be brought prior to the adoption of the redevelopment plan nor at any time after the elapse of 60 days from and after the date of adoption of the ordinance adopting or amending the plan.

The amendments made to this section at the 1977-78 Regular Session of the Legislature do not represent a change in, but are declaratory of, existing law.

(Amended by Stats.1977, c. 797, p. 2446, § 13.)

§ 33501. Purpose of proceeding; law governing

An action may be brought pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure to determine the validity of bonds and the redevelopment plan to be financed or refinanced, in whole or in part, by the bonds, or to determine the validity of a redevelopment plan not financed by bonds, including without limiting the generality of the foregoing, the legality and validity of all proceedings theretofore taken for or in any way connected with the establishment of the agency, its authority to transact business and exercise its powers, the designation of the survey area, the selection of the project area, the formulation of the preliminary plan, and the adoption of the redevelopment or renewal plan, and also including the legality and validity of all proceedings theretofore taken and (as provided in the bond resolution) proposed to be taken for the authorization, issuance, sale and delivery of the bonds and for the payment of the principal thereof and interest thereon.

(Added by Stats.1963, c. 1812, p. 3702, § 3. Amended by Stats.1965, c. 1665, p. 3788, § 40.)

(5)

Supreme Court, U.S.

FILED

OCT 27 1988

JOSEPH E. SPANIOL, JR.
CLERK

No. 87-2086

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

DAVID A. BOONE, et al.,
Petitioners,

v.

REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE, et al.,
Respondents.

**BRIEF OF RESPONDENT THE KOLL COMPANY
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DAVID T. ALEXANDER
(Counsel of Record)

J. DAVID BLACK

DEBRA L. KASPER

JACKSON, TUFTS, COLE & BLACK

60 South Market St., 10th Flr.

San Jose, California 95113

(408) 998-1952

Counsel for Respondent

The Koll Company

24pp

QUESTION PRESENTED

Respondent The Koll Company ("Koll") addresses principally the second issue raised by the Petition For Writ of Certiorari—whether Petitioners can avoid the application of the constitutionally based privilege reflected in the *Noerr-Pennington* doctrine as a bar to their antitrust claims, where their only claims arise out of Koll's successful petitioning of local governmental bodies, and when, on three occasions, Petitioners have pled only vague and conclusory averments, none of which falls within any exception to *Noerr-Pennington*.

LIST OF PARTIES AND AFFILIATES

As required by Supreme Court Rule 28.1, Respondent The Koll Company hereby states that it has no parent company and no subsidiaries other than wholly owned subsidiaries. The list of named parties contained in the Petition For Certiorari is correct, with the following exceptions: Frank Taylor was never served with Petitioners' complaint or amended complaint and is not a party; and the reference to "Arnold" Goglio should refer instead to "Donald" Goglio. Respondent The Koll Company also certified to the Ninth Circuit the following persons, not named as parties, who had an interest in the outcome of the proceeding:

Koll Pueblo Uno Assoc., a General Partnership

Pueblo Uno Partners, a General Partnership

Pueblo Uno Investors, a General Partnership

H&H—Pueblo Uno, a General Partnership

HFJA—Pueblo Uno, a General Partnership

PAT&J—60 South Market St., a Limited Partnership

Nolte—Market St., a General Partnership

Westwood Company—Market St., a General Partnership

LMF&T—Properties I, a Limited Partnership

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No. 87-2086

In the Supreme Court

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OCTOBER TERM, 1987

DAVID A. BOONE, et al.,
Petitioners,

v.

REDEVELOPMENT AGENCY OF THE CITY OF SAN JOSE, et al.,
Respondents.

BRIEF OF RESPONDENT THE KOLL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

For the reasons set forth herein, Respondent The Koll Company ("Koll") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's opinion in this case.

STATEMENT OF THE CASE

This lawsuit arose out of Petitioners' complaint that they were unable to obtain adequate parking facilities in downtown San Jose, California, to meet the needs of tenants in their office building. Petitioners' claims against Koll arose solely out of Koll's successful efforts to obtain local government action, through the City of San Jose ("the City") and the Redevelopment Agency of the City of San Jose ("Redevelopment Agency"), allowing Koll to build an office building in downtown San Jose. The appeal before the Ninth Circuit arose out of the dismissal of Petitioners'

Second Amended Complaint by the United States District Court for the Northern District of California, for failure to state a claim upon which relief could be granted.

Petitioners' Original and First Amended Complaint

Petitioners' original complaint, filed on December 12, 1984, asserted ten claims against Koll, the City, and the Redevelopment Agency. When the City and the Redevelopment Agency moved for judgment on the pleadings, Petitioners requested leave to amend, which was stipulated to by the defendants. On May 8, 1985, Petitioners filed their First Amended Complaint adding Respondent Frank Taylor, the head of the Redevelopment Agency, as a named defendant. The First Amended Complaint asserted only two causes of action against Koll, one of them for alleged violation of the Sherman Act.¹

Both Koll and the City moved to dismiss the First Amended Complaint. At the hearing on their motion on July 9, 1985, the district court indicated its preliminary assessment that Petitioners' antitrust claims were deficient, and allowed Petitioners a third opportunity to state a claim. The district court cautioned Petitioners that their claims would be dismissed with prejudice if they were unable to state adequate claims for relief in their third attempt. On July 25, 1985, Petitioners filed their Second Amended Complaint, the dismissal of which was the subject of the appeal to the Ninth Circuit.

Petitioners' Second Amended Complaint

In their Second Amended Complaint, Petitioners averred that they were induced by the City and the Redevelopment Agency to build a large office building in the Pueblo Uno Redevelopment Project Area ("the Project Area") in San Jose by the "promise of

¹ 15 U.S.C. §§ 1, 2. The other claim asserted against Koll was for the alleged violation of the Civil Rights Act, 42 U.S.C. § 1983. Petitioners do not ask this Court for review of any issue related to this latter claim, which was also dismissed by the district court.

protection in the form of City-provided parking facilities.”² Petitioners claimed that the original Pueblo Uno Redevelopment Plan (“the Redevelopment Plan”) adopted by the City Council specified that the City intended to provide parking within the Project Area to be used by all those who invested in the Project Area. SAC ¶ 15. Petitioners alleged further that, in obtaining financing for their office building and in designing their building with inadequate parking, they relied upon the Redevelopment Plan, as well as upon “repeated assurances” from unnamed employees of the City and the Redevelopment Agency that parking would be provided by the City. SAC ¶¶ 29-31, 40.

Thereafter, a parcel of land in the Project Area originally designated for public parking was conveyed by the City to Koll for the construction of an office building. This new building included more than 800 parking spaces to serve Koll’s tenants. SAC ¶¶ 38, 51. According to Petitioners, Koll was permitted to construct its building as a result of an amendment to the Redevelopment Plan adopted by the San Jose City Council after at least two public hearings. SAC ¶¶ 47, 51. Petitioners then alleged that they had been induced by unnamed City and Redevelopment Agency officials not to oppose the amendment to the plan which allowed the conveyance of the land for the proposed public parking site to Koll by assurances that alternative public parking would be provided. SAC ¶¶ 39, 46. Petitioners further alleged that the Redevelopment Agency eventually reneged on this “promise” to provide “alternative parking” at another location. SAC ¶ 67. As a result of the lack of adequate parking facilities in their own building, Petitioners contended they were unable to attract enough tenants to operate economically, and thereby incurred damages in excess of \$56 million. Petitioners did not allege, in either their original or their amended complaints, that any representations were made to them by Koll.

² See Petitioner’s Second Amended Complaint, ¶ 4, reprinted as Appendix C in Petitioners’ Appendix herein. Hereafter, references to the Second Amended Complaint will be as follows: “SAC ¶ ____.”

The Opinion of the District Court

After three attempts, Petitioners' pleading failed to state facts constituting a claim against Koll. Petitioners claimed in a conclusory manner that Koll "conspired with defendant City and Agency officials, Frank Taylor, and [other unnamed] co-conspirators . . . to interfere with plaintiffs' business, eliminate plaintiffs as a competitor," SAC ¶ 5(d), and "receive preferential treatment." SAC ¶ 11(b). As the Ninth Circuit acknowledged in its opinion, Petitioners alleged that Koll violated the antitrust laws by four basic actions:

(1) Koll "developed close relationships with City and Agency officials, [and] made *ex parte* secret contact with those officials. . . ." SAC ¶ 11(a);

(2) Koll conspired with the co-defendants "in making false property appraisals, financial analysis, and misrepresentations . . . and to mislead the legislative body to induce it to adopt and pass the Koll development agreement. . . ." SAC ¶ 11(h);

(3) Koll "secretly negotiated with the City" and had "secret contact and agreements with City and Agency officials," to amend the Redevelopment Plan. SAC ¶ 11(c), 11(e);³

(4) Koll "created special relationships with City officials, hired key City officials, and made direct payments and other valuable considerations and inducements to City and Agency personnel."⁴ SAC ¶ 27.

³ Presumably the referenced "agreements" were agreements by the City to amend the Redevelopment Plan to allow Koll to build its own office building and parking facility. The only other agreement referenced in the Second Amended Complaint was an alleged agreement among Koll and the City and the Redevelopment Agency "not to contact other City agencies" about Koll's proposal. SAC ¶ 32. This latter claim refers to the City Council's decision to issue a negative declaration as to the environmental impact of Koll's proposed development. SAC ¶ 56.

⁴ These amorphous averments were not further developed elsewhere in the complaint. Petitioners' counsel later submitted declarations to the

The district court examined these claims against Koll, as well as Petitioners' other averments, and concluded that it had "no difficulty" in determining that, as pleaded for the third time, Petitioners could prove no set of facts to support their claims which would entitle them to antitrust relief against the defendants.⁵ The district court held that Koll's conduct alleged in the complaint was immune from antitrust liability under the *Noerr-Pennington* doctrine.⁶ In so holding, the district court expressly acknowledged the case law cited by Petitioners holding that the *Noerr-Pennington* doctrine does not protect those who employ illegal means to influence government and does not protect actions that go "beyond traditional political activity." "However," the district court reasoned, "in the instant case, nothing is

district court in which he listed various campaign contributions in small amounts allegedly made from 1979 through 1985 primarily by officers and employees of Koll to City officials. As the Ninth Circuit recognized in its opinion, nowhere in the complaint did Petitioners allege that there was anything unlawful or improper about those campaign contributions; nor did they allege anywhere in the complaint that any bribery had occurred.

⁵ Memorandum of Decision, January 24, 1986, at 8, reprinted as Exhibit B in Petitioners' Appendix, at A-28 (hereafter "Petitioners' App. B"). The court made this statement in connection with its ruling that defendants' conduct was protected under the principles of state action immunity set forth in *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). Since the state action immunity serves to remove the parties' alleged conduct from the scope of the Sherman Act, it also immunizes Koll's conduct as a private party acting in concert with the governmental agencies. See, e.g., *Cine 42nd Street Theatre Corp. v. Nederlander Org.*, 790 F.2d 1032, 1048 (2d Cir. 1986); *Mercy- Peninsula Ambulance v. San Mateo County*, 791 F.2d 755, 759 (9th Cir. 1986). Because the questions presented as to the applicability of *Parker v. Brown* are discussed in the City's accompanying brief, they are not addressed here. However, *Parker v. Brown* was an additional ground for the dismissal of Koll.

⁶ *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).

pleaded, beyond conclusory materials, to properly allege unlawful conduct on the part of The Koll Company or activity transcending legitimate lobbying." Petitioners' App. B, at A-30.

In concluding that Petitioners' averments failed to state a claim, the district court expressly referred to Federal Rule of Civil Procedure 9(b), explaining that the Rule requires specificity if some "impropriety in the nature of bribery" or other such grave allegations had been intended. Petitioners' App. B, at A-25-26. The district court also held that Petitioners had failed to plead a conspiracy, having failed to allege "at a minimum" the authority of those who purported to do the acts alleged in support of the claimed conspiracy.

The Opinion of the Ninth Circuit

The Ninth Circuit affirmed the district court's order and judgment dismissing Petitioners' Second Amended Complaint. The court of appeals, like the district court, focused its opinion upon the conclusory and nonspecific nature of Petitioners' allegations. In the portion of the Ninth Circuit's opinion that addresses the *Noerr-Pennington* doctrine, the court explained at the outset that its review of Petitioners' arguments as to the sufficiency of the complaint was guided in part by "the fundamental first amendment values that the *Noerr-Pennington* doctrine is designed to protect." 841 F.2d at 894. The court explained:

In order not to chill legitimate lobbying activities, it is important that a plaintiff's complaint contain specific allegations demonstrating that the *Noerr-Pennington* protections do not apply. . . . Conclusory allegations are insufficient to strip them of their *Noerr-Pennington* protection. Although we may be more generous in reviewing complaints in other contexts, our responsibilities under the first amendment in a case like this one require us to demand that a plaintiff's allegations be made with specificity.

Id. (citations omitted), citing *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1080-81 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

The Ninth Circuit then began its analysis with a determination as to whether the alleged activities on the part of Koll are the type that the *Noerr-Pennington* doctrine seeks to protect. The court held that the development of "close relationships" with City officials was the essence of lobbying and thus went to the heart of the *Noerr-Pennington* doctrine. The court found the same to be true of Petitioners' allegations that Koll made factual misrepresentations. The court noted that the alleged misrepresentations can be accommodated by the City Council and the Redevelopment Agency, "acting in the political sphere" and that, while such misrepresentations cannot be condoned, they are not of consequence under the Sherman Act.

The court then examined Petitioners' claims that Koll had "secret negotiations" with the City and reached "secret agreements" with the City, and the court held that these activities, too, were protected under *Noerr-Pennington* because: (a) Petitioners had not alleged that these activities were either illegal or outside the protection of the first amendment; (b) Petitioners did not allege that these activities occurred other than for legitimate petitioning of government; and (c) Petitioners had not alleged the nature of the agreements or meetings or identified the City officials involved. Even so, the court reasoned, *ex parte* meetings between government officials and petitioning individuals present a classic case for the application of *Noerr-Pennington*.

Likewise, the Ninth Circuit held that Petitioners' allegations of "payments to" and "hiring of" City officials were made "in the most conclusory of fashions. We are not told who, when, how much, or for what purpose." 841 F.2d at 895. The court noted that Petitioners did not allege that the claimed payments to, or hiring of, City officials was otherwise illegal. *Id.* Thus, the court concluded, the hiring of former City officials, presumably for their expertise, and Koll's conduct in paying honoraria or campaign contributions, were a traditional part of the political process and thus fell within the *Noerr-Pennington* doctrine.

Next, the Ninth Circuit considered Petitioners' contentions that their claims against Koll should fall within some exception to *Noerr-Pennington*. First, the court held that the "sham" exception did not apply because Koll genuinely sought official action

from the City and the Redevelopment Agency. Second, the court rejected Petitioners' argument, based upon *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972), that Koll's alleged conduct constituted illegal or reprehensible activity which ought not to be immune. The court noted that the narrower standard of activities permitted under *California Motor Transport* involved an adjudicatory context. The court examined at length the context in which Koll's alleged "misconduct" took place and concluded that, although this case did not require it to draw a "bright line," the context was essentially legislative.

Finally, the court rejected Petitioners' argument that because they had alleged that City officials were co-conspirators, *Noerr-Pennington* immunity should not apply. The court noted that the authority of the Ninth Circuit's opinion in *Harman v. Valley Nat. Bank of Arizona*, 339 F.2d 564, 566 (9th Cir. 1964), had been repudiated. 841 F.2d at 897, citing *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969). More significantly, the court explained: "*Noerr-Pennington* cannot be removed by merely alleging that a government official was involved in the alleged conspiracy." 841 F.2d at 897. The court cited *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 231 (7th Cir. 1975) as rejecting such a blanket exception because it would abrogate the *Noerr* doctrine. *Id.*

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE NINTH CIRCUIT'S OPINION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *ALLIED TUBE*

The petition for writ of certiorari focuses principally upon Petitioners' contention that the Ninth Circuit's opinion in this case is in conflict with the Court's recent decision in *Allied Tube Corp. v. Indian Head*, 486 U.S. ___, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988) ("*Allied Tube*"). The Ninth Circuit's opinion is not contrary to the holding in *Allied Tube*, nor does it conflict with the general approach taken by this Court in *Allied Tube*.

The central thrust of *Allied Tube* was the applicability of the *Noerr* doctrine to *private* standard-setting associations. The Court held that, despite the political impact of the conduct challenged in that case, because of its nature and its context—a private setting outside the political arena—it was the type of commercial activity that has traditionally been regulated by the antitrust laws. Quite the contrary is *this* case, where the alleged injury arose out of the legislative processes of the San Jose City Council in conjunction with the Redevelopment Agency. Nothing in *Allied Tube* affects the “wide berth” of antitrust immunity accorded to the traditional avenues of political expression which the Ninth Circuit affirmed were the only kinds of activity that Petitioners had alleged in this case.

The Ninth Circuit’s approach in analyzing Petitioners’ averments followed the general principles stated in *Allied Tube*. In *Allied*, the Court cautioned that the *Noerr* doctrine does not immunize every activity that is genuinely intended to influence governmental action, and that the ultimate legislative aim of the challenged conduct is not dispositive. Rather, the Court emphasized that the context and nature of the challenged conduct should be evaluated to determine whether it is political activity with a commercial impact or commercial activity with a political impact. In its opinion below, the Ninth Circuit made exactly that kind of evaluation.

The court of appeals commenced its analysis by determining whether the alleged acts were the kind that the *Noerr* doctrine seeks to protect. The court held that the complaint alleged nothing other than traditionally protected, legitimate lobbying of government. The court specifically held the context to be legislative. Contrary to Petitioners’ assertion, the Ninth Circuit did not suggest that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. Rather, the Ninth Circuit expressly recognized that the range of immunized lobbying activities “would be much narrower” in an adjudicatory context. In light of the court’s determination that the challenged conduct occurred in a legislative context and that no conduct was alleged beyond legitimate lobbying, the court of appeals properly did not draw a bright line between legislative

processes and adjudicative processes, nor did it decide what types of conduct, if any, might subject a party to antitrust liability in a purely political context.⁷

Petitioners suggest yet another reason for their assertion that there is a conflict between *Allied Tube* and the Ninth Circuit's opinion. Petitioners point to footnote 7 of this Court's opinion and contend that a "co-conspiracy" involving public officials should not be immunized. However, nothing in that footnote would have required the removal of *Noerr* protection for Koll's legitimate lobbying activities merely because Petitioners alleged a "conspiracy" in the most conclusory terms in their complaint.⁸ If the mere allegation of a "conspiracy" were all that were required to create an exception to the *Noerr* doctrine, *Noerr* would be entirely abrogated, at the expense of the first amendment rights it was designed to protect.

Finally, Petitioners contend that the Ninth Circuit should have held that their claims fall within the "sham" exception to the *Noerr* doctrine. Petitioners base this argument upon the Court's criticism of the approach to the "sham" exception taken by the Ninth Circuit in *Sessions Tank Liners, Inc. v. Joor Mfg.*, 827 F.2d

⁷ The district court had expressly acknowledged the cases holding that *Noerr* does not protect certain illegal conduct or activities that go beyond traditional political activity. However, the district court found it did not need to determine the applicability of those principles to this case, since such activities were never properly pleaded. In fact, the conduct challenged by Petitioners—Koll's allegedly developing close relationships with government officials, allegedly using misrepresentations to induce governmental action, and allegedly making "payments" to government officials, all in a legislative context,—is precisely the conduct that was held immune by *Noerr*.

⁸ Indeed, the referenced footnote concerned the difficulty of distinguishing in some cases between trade restraints resulting from government action and those resulting from private action. The case of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962), discussed in the footnote, in fact concerned the effects of the conduct of a private company, a subsidiary of Union Carbide, that was functioning as purchasing agent for the purchase of certain metals for the Canadian Metals Controller.

458, 465, n.5 (9th Cir. 1987), *cert. granted, vacated and remanded*, ____ U.S. ____, 108 S.Ct. 2862, 101 L. Ed. 2d 899 (1988). This argument, Koll submits, reflects a misreading of the Court's opinion.

In footnote 10 of *Allied Tube* the Court criticized the use of the "sham" exception as a catch-all exception that could apply to any activities which the courts deem unworthy of antitrust protection. The Court explained that "[s]uch a use of the word 'sham' distorts its meaning and bears little relation to the sham exception *Noerr* described to cover activity that was not genuinely intended to influence governmental action." 486 U.S. at ____, 108 S.Ct. at 1941, 100 L.Ed.2d at 510, n.10. The Ninth Circuit's opinion in this case is entirely consistent with that principle. Specifically, the Ninth Circuit held the sham exception to be inapplicable precisely because Petitioners never alleged that Koll was not genuinely seeking official action from the City and the Redevelopment Agency. 841 F.2d at 895.⁹

⁹ Petitioners also contend that the facts pleaded in their complaint "imply" bribery, and they argue that such allegations warrant an exception to *Noerr* based upon the Court's statement in *Allied Tube* that it has "never suggested that that kind of attempt to influence the government merits protection." 486 U.S. at ____, 108 S.Ct. at 1939, 100 L.Ed. 2d at 507. However, regardless of whether actual bribery would remove the protections of *Noerr*, Petitioners never alleged bribery in this case. Neither the district court nor the Ninth Circuit had any difficulty so concluding.

Additionally, Petitioners argue that the Ninth Circuit's opinion is in conflict with the Eighth Circuit's rulings on the sham exception in *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288 (8th Cir. 1978), and *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987). Quite the contrary, the Eighth Circuit, like the Ninth Circuit below, based its decision in those cases upon whether the defendants were genuinely seeking to influence governmental action.

II

**THERE IS NO CONFLICT AMONG THE CIRCUITS:
NONE HOLD THAT AN EXCEPTION TO NOERR CAN
BE INVOKED BY MERE CONCLUSORY AVERMENTS
OF A CONSPIRACY INVOLVING A GOVERNMENT
OFFICIAL**

Petitioners contend that the Ninth Circuit's opinion below and the Seventh Circuit's opinion in *Metro Cable Co. v. CATV of Rockford, Inc.* ("Metro Cable"), *supra*, are in conflict with the Fifth Circuit, which recognized and applied a "co-conspirator" exception to the *Noerr* doctrine in *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555 (5th Cir. 1984), *cert. denied*, 474 U.S. 1053, 106 S. Ct. 788, 88 L. Ed. 2d 766 (1986) ("*Affiliated Capital*"). Upon the facts alleged in Petitioners' complaint, however, the issue of the existence or extent of the so-called "co-conspirator" exception is not squarely presented for review.

No court of appeals has held that the fundamental protection of *Noerr-Pennington* can be lost merely because a plaintiff alleges, without more, that a government official has "conspired" in the challenged conduct of a private party. Rather, the two cases in which a court of appeals has applied the so-called "co-conspirator" exception have involved facts that were markedly different from the facts averred in this case. *Affiliated Capital, supra*; *Duke & Co. v. Foerster*, 521 F.2d 1277 (3d Cir. 1975), discussed *infra*.

In *Affiliated Capital*, although the Fifth Circuit explained its ruling in terms of a "co-conspirator" exception, the facts of the case demonstrate that no true governmental decision-making process was involved. In *Affiliated Capital*, the mayor of Houston and the Houston City Council had completely abdicated their legislative duties in favor of a small group of private businessmen who divided up the cable television franchise business in Houston among themselves to the exclusion of their competitors. As a result, the defendants' challenged conduct did not involve a genuine attempt to influence public officials to take governmental action.

Similarly, *Duke & Co. v. Foerster, supra*, the other appellate decision that is sometimes cited for the proposition that there is a separate "co-conspirator" exception to *Noerr*, also did not involve political expression intended to influence governmental action. Instead, the case concerned several governmental defendants' liability in connection with an economic boycott of plaintiff's products, not a private party's lobbying activities.¹⁰

Several courts of appeals have uniformly rejected claims of antitrust liability based upon a "co-conspirator" exception where, as here, those claims rest upon only the most conclusory allegations. These cases demonstrate that courts of appeals have regularly looked critically at efforts to avoid summary judgment or dismissal by making conclusory allegations of some loose conspiracy. Indeed, the very next year following its decision in *Affiliated Capital*, the Fifth Circuit declined to apply the co-conspirator exception in two cases where the challenged activities did not warrant an exception to the *Noerr* doctrine. In one case, the court affirmed a summary judgment entered in favor of the private defendant upon grounds of *Noerr* immunity, rejecting a claim that the case fell within the "co-conspirator" exception because there was nothing in the record beyond a mere allegation in one of the pleadings that the defendants conspired to monopolize. *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607, 612, n. 9 (5th Cir.), *cert. denied*, 474 U.S. 903 (1985), *citing Metro Cable*.

In *Greenwood Utilities Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1500 (5th Cir. 1985), the Fifth Circuit once again affirmed a grant of summary judgment in favor of a private party, again declining to apply the "co-conspirator" exception where

¹⁰ In a recent decision, the District of Columbia Circuit held that *Noerr* did not protect a boycott even though its specific objective was to influence the legislative process, reasoning that the trade restraint of the boycott resulted from private rather than governmental action and was therefore primarily commercial in nature. The court referred to *Allied Tube* and explained this Court's general approach for determining whether concerted activity falls within *Noerr* in much the same way it is discussed above. *Superior Court Trial Lawyers Ass'n v. Federal Trade Commission*, 1988 Trade Cases (CCH) ¶ 68,196 (August 26, 1988).

there was no evidence to support it, only a claim that public officials had acted outside the scope of their statutory authority and thus conspired with the defendants. The court distinguished its earlier opinion in *Affiliated Capital* as falling within the "sham" exception to the *Noerr* doctrine because, among other reasons, the challenged activities were not genuinely intended to influence public officials.

The District of Columbia Circuit also declined to adopt the "co-conspirator" exception in a case in which it found, as a matter of law, that the evidence did not support a claim of conspiracy. In reaching its conclusion, the court stated that it was doubtful that the existence of a co-conspirator exception would explain any result more satisfactorily than one of the "more established" exceptions to the *Noerr* doctrine. The court specifically noted that "[i]t would make a nullity of *Noerr*" to hold a public body to be a co-conspirator just because the public body agreed with the petitioner. *Fed. Prescription Service v. Amer. Pharmaceutical Ass'n*, 663 F.2d 253, 264-65, and n.11 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).¹¹

In harmony with these rulings, the Ninth Circuit in this case and the Seventh Circuit in *Metro Cable* properly declined to apply a blind "co-conspirator" exception because in neither case did the facts as alleged warrant any exception from the *Noerr-Pennington* doctrine. In both cases the plaintiffs' complaints were dismissed based upon the plaintiffs' failure, after three opportunities, to allege adequate claims. In *Metro Cable* the court emphasized, in affirming the dismissal of the second amended complaint, that the only allegations upon which plaintiffs based their antitrust conspiracy claims were that: (a) two public officials were persuaded to support the private defendants' application for a television

¹¹ The Eighth Circuit also has refused to adopt a blanket "co-conspirator" exception, choosing instead to make its determination by evaluating the nature of the challenged conduct in its context. *First American Title Co. of S.D. v. S.D. Land Title Ass'n*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984) (use of misrepresentations not excepted from *Noerr*, at least in context of legislative lobbying).

franchise and oppose the plaintiff's application; and (b) the public officials received campaign contributions "in exchange" for this undertaking. 516 F.2d at 230. The court explained its decision as follows:

Plaintiff's position is in essence that an agreement to attempt to induce legislative action is a "conspiracy," and that if some of the "conspirators" persuade a member of the legislative body to agree to support their cause, he becomes a "co-conspirator" and a Sherman Act violation results. Such a rule would in practice abrogate the *Noerr* doctrine.

Id. The Seventh Circuit did not hold that it would never find antitrust liability where a public official is alleged to be an active participant in the challenged conduct. Rather, the Seventh Circuit's decision, like the Ninth Circuit's opinion below, was based upon the plaintiff's inability to plead anything more than conclusory allegations that there was a "conspiracy." Thus, even if there were some room for disagreement as to the existence of, and rationale for, a separate "co-conspirator" exception, the issue is not ripe for the Court's review in this case because no conspiracy was adequately pleaded. This case remains what it has always been: a failure by Petitioners to plead facts to fall outside well-established legal principles immunizing conduct in the legislative arena. No further clarification from this Court is necessary.

In ruling that Petitioners' allegations were insufficient to allege an antitrust claim, both the district court and the Ninth Circuit applied the rule set forth in *Franchise Realty*,¹² requiring specificity in pleading a claimed exception to the *Noerr-Pennington* doctrine, in order not to chill the first amendment rights protected by the doctrine. Notably, Petitioners do not ask the Court to review that pleading standard. Moreover, the *Franchise Realty* standard is consistent with the general rule that mere conclusory allegations of an antitrust "conspiracy," without factual specificity, do not give the plaintiff fair notice of the claim asserted against it. *E.g., Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974 (11th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986), (affirmed

¹² *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, *supra*, 542 F.2d at 1080-81.

dismissal for failure to state a claim); *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266 (5th Cir. 1979); see also *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177, n.8 (10th Cir. 1982) (adopted *Franchise Realty* standard).

Finally, as to Petitioners' argument that they were curtailed in their discovery efforts and thus were unable to allege facts more specifically, the district court's opinion refers to a stipulated order staying discovery until May 20, 1985. Nothing prevented Petitioners from taking discovery thereafter and before filing their Second Amended Complaint two months later.

III

THERE IS NO CONFLICT WITHIN THE NINTH CIRCUIT CONCERNING THE "CO-CONSPIRATOR" EXCEPTION

Petitioners also seek review of the Ninth Circuit's opinion in this case upon grounds that it conflicts with the Ninth Circuit's own decisions in *Harman v. Valley Nat. Bank of Ariz.*, *supra*, and *Sessions Tank Liners, Inc. v. Joor Mfg. Co.*, *supra*.

In *Harman* the court reversed a judgment dismissing plaintiff's antitrust claims because: (a) the complaint alleged that the challenged activity was part of a broader monopolistic scheme; and (b) the complaint alleged that a public official was a participating conspirator. However, *Harman* was long ago discredited by the Ninth Circuit in *Sun Valley Disposal Co. v. Silver State Disposal Co.*, *supra*, 420 F.2d 341 (9th Cir. 1969). In rejecting *Harman*, the court in *Sun Valley* explained that the first prong of *Harman* had been decided otherwise in *Pennington*, and the court explained further that "[a] plaintiff cannot, by charging a conspiracy, turn what is basically a claim of violation of state law into a federal antitrust case." 420 F.2d at 343.

There is no inconsistency between the Ninth Circuit's opinion in this case and its opinion in *Sun Valley*. To the extent that the Ninth Circuit recognized the "co-conspirator" exception in *Sessions Tank Liners*, that opinion has been vacated by this Court and remanded for further proceedings. Most importantly, the Ninth Circuit's opinion is wholly consistent with its decisions in

Franchise Realty and Llewellyn v. Crothers, 765 F.2d 769, 775 (9th Cir. 1985), in which the court previously held that vague and conclusory allegations of an antitrust conspiracy between private and governmental defendants do not negate the important immunity of *Noerr-Pennington*.

IV

SUPREME COURT REVIEW IS NOT WARRANTED AS TO THE PLEADING DEFECTS AT ISSUE IN THIS CASE

Despite their effort to couch their arguments in terms traditionally cognizable by this Court, what Petitioners seek, in essence, is to raise disputes over pleadings defects, and perhaps even discovery, to the level of Supreme Court review. The courts below did not err in their analyses and determinations in these respects, and no proper or sufficient basis has been advanced by Petitioners for this Court to reconsider the judgment.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

October 26, 1988

DAVID T. ALEXANDER
(Counsel of Record)

J. DAVID BLACK

DEBRA L. KASPER

JACKSON, TUFTS, COLE & BLACK

Counsel for Respondent

The Koll Company

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No. 87-2086

Supreme Court, U.S.

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CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

DAVID A. BOONE, et al.,
Petitioners,

VS.

REDEVELOPMENT AGENCY OF THE
CITY OF SAN JOSE, et al.,
Respondents.

PETITIONERS' REPLY BRIEF

HERBERT F. KAISER
The Alcoa Building Suite 1600
One Maritime Plaza
San Francisco, California 94111
Telephone: (415) 392-1184
Attorney for Petitioners
David A. Boone, et al.



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REASON FOR GRANTING WRIT

The Agency's Giving Koll Market Power by Monopoly and Acceding to Koll'S Demand to Deny Essential Parking Facilities to Competitors, So That Koll Could Predatorily Acquire Their Businesses, Is Not a "Necessary and Reasonable Consequence" of Engaging in Redevelopment in This Market

REPLY ARGUMENT

I

DETAILED ACCURATE STATEMENT OF THE RECORD DISTORTED BY RESPONDENTS

Respondents, unable to meet the issues raised by the Petition herein, have instead substituted their own version of Petitioner's position, grossly distorted the record to deny the detailed allegations and their Briefs in Opposition replied to that made-up version ignoring controlling statutes and case law.¹

A. 1975 Legal Plan Allowing Private Enterprise To Develop And Alleviate Blight

The 1975 plan, although finding blight, found that private enterprise could alleviate it without condemnation or anti-competitive conduct.²

By 1981 blight had been eliminated by private enterprise in the context of *Regus v. City of Baldwin Park*, 70 Cal.App. 3d 968 at 980 (1977) Petition p. 10. and there was a shortage of essential parking facilities to operate the businesses that had developed. Petition, Appendix, SAC, ¶ 20, A-42-43.³

¹ Respondents start out by misleading the court when they state Frank Taylor the named executive director never appeared in the action in the motions to dismiss prior to the appeal. Agency attorney Mr. Khourie stated at both hearings to dismiss that he represented defendant "Mr. Taylor". (Reply Brief Appendix C-1, C-2)

² Supplemental Brief Appendix B-2; B-14.

³ See colored photos of buildings developed in the area prior to Koll building, Appendix "D" to Petition, Docket # 90, A-66-86.

The plan recognized the 1971 judicially noticed "*fact of life that the availability of parking facilities is essential to commercial enterprise in highly developed areas.*" *City of Los Angeles v. Wolfe*, 6 C.2d 326, 336; 99 CR 21 (1971), and provided for parking by public improvements.⁴ But *private enterprise*, as required in Health and Safety Code Section 33037(b)(A-190), without public participation or assistance had *acquired the land, planned and financed the land assembly, clearance and construction of improvements.*

B. 1983 Illegal Amended Plan Without Necessary Finding Of Blight Or Necessary Finding That Private Enterprise Could Not Alleviate The Blight

In December 1983, the executive director of the Agency vigorously orchestrated with the Koll Company an illegal Amended Plan (the "Plan") which falsely stated that the amended Plan conformed to state law and which provided for condemnation and other anti-competitive activity although no finding of blight or inability of private enterprise to alleviate blight was made or could have been made.⁵

C. Legislative Intent

California Health and Safety Code Sections 33030, 33031 C-4), 33032, 33037(b) and 33352 (C 188-190) were enacted to eliminate perceived abuses by Redevelopment Agencies which would acquire land and publicly finance projects when it was probable that the development would have occurred anyway through natural market process. Those statutes required a finding of (1) blight and (2) that private enterprise could not alleviate it, *Emmington v. Solano County Redevelopment Agency*, 195 Cal.App.3d 491 at 497 (1986). The legislative hearings and testimony clearly show that private enterprise was to be en-

⁴ Supplemental Brief, Appendix I, B-2-3.

⁵ Supplemental Brief, Appendix VI, B-15.

couraged to develop without public expenditure except for the infrastructure.⁶

D. Detailed Allegations In SAC Of Overt Acts Of Koll With Participation And Vigorous Orchestration Of Agency Director

Even without any discovery,⁷ Petitioner's allegations were quite detailed. In the month of April, 1981, Koll developed its scheme. (SAC, ¶¶ 25 and 26.) It took steps to develop the scheme including paying inducements (SAC, ¶ 27)⁸ and in the Spring of 1981 met with Agency defendants and made certain detailed agreements (SAC, ¶ 28). In furtherance of the scheme Koll got the Agency officials to demand that Petitioner build a larger than planned building and *insist* that Petitioners not plan for their own adequate on-site parking (SAC, ¶ 29).

⁶ Legislative intent, Petition, Appendix F. A112: They reason that much of the "redevelopment" attributed to formation of the agency is really "development" which might well have occurred without the project and the concomitant loss of revenue to other taxing entities." A118-119.

"The League (of cities) believes, however, that government should use redevelopment as a stimulant to the local economy only when private market forces appear incapable of significantly improving declining areas within a reasonable time. Community development planning should identify the role of the private sector in supporting local economy policy and plans. Government action using redevelopment authority should occur where the private sector will not or cannot further local goals."

⁷ Petitioners were prevented from taking any discovery up to the hearing on the 12(b)(6) motion to dismiss the first amended complaint set for 5/20/85. That hearing was continued to 7/9/85 and the order remanded in effect. On 7/9/85, the date of the hearing, petitioners were given only 15 days to amend, thus by court order in contested hearings Petitioners were denied any discovery. Appendix to Reply Brief, Portions of Transcript of 7/9/85 hearing, C-1.

⁸ These financial inducements included illegal campaign contributions above the \$250.00 limit to City Council, Petition, Appendix "J" A-164-174; Members of the City Council also profited from an illegal bond issue to finance the Koll project. Petition, Appendix "K" A-176.

The conspiracy continued, with most of the dirty work done by Agency personnel (SAC, ¶¶ 30-31), but on April 8, 1982, a further secret agreement was entered into by Koll and Agency officials, to illegally monopolize the market with an agreement which included an illegal avoidance of normal governmental environmental review safeguards (SAC, ¶ 32; A-46).

Subsequently Koll and the agency director participated in false representations to the City legislative body involving violations of state law and participated in a false statement as to the validity of the Amended plan and false appraisal and analysis of the Koll project. *alleged in the following cited key paragraphs of the SAC. (SAC, 38 (A-48-49) 57, 58, 59, (A-53-54.))*

E. Deception To Prevent Opposition To Amended Plan Within 60 Days And Thus Deny Access To Administrative And Judicial Processes

To deceive petitioners not to challenge the Amended Redevelopment Plan within the 60-day period provided for in H&S Code § 33500 they incorporated into the plan various provisions for *"adequate land for parking and open spaces" and "parking facilities," "of benefit to the project area."* (Appendix II, B-6-7).

SAC, ¶¶ 39-55 (A-49-53); ¶¶ 61-65 (A-54-55) describe in detail the deception of respondents.

Petitioners agreed to pay for their portion of the parking facilities pursuant to City ordinance.⁹

F. Koll Secretly Demanded That Agency Take Administrative Action To Deny Essential Parking

Its most significant illegal act was, in November 1984, to first announce a blood bath in competition and then to secretly demand that its co-conspirators formally renege on the 1975 and 1983 plans and provisions for essential parking and on the false promises that had been made to Petitioners. (SAC, ¶ 67, A-55.)

"67. In November, 1984 Koll executives announced a 'Blood Bath' in competition for downtown office space rental

⁹ (SAC par. 62 (A-54); (SAC par. 55 (A- 52.))

market. Koll anticipated that by being first to complete, plaintiffs might succeed in contracting with desirable tenants based on the belief that there would be a parking arrangement utilizing the Market Street garage. To prevent plaintiffs' building from absorbing the limited supply of office building tenants, Koll demanded that the Agency renege. In response to that demand, the Agency then formally reneged on its promise to plaintiffs of this alternate parking. Such actions was without any rational relationship to any permissible interest in the City."

Thus, Petitioners have alleged when and how Koll set up its conspiracy to monopolize, times and details in steps of setting it up, and the time and detail of the final step to destroy the business of Petitioners.

G. Antitrust Injury

As a result of the conspiracy by administrative denial by Taylor of essential parking as stated in both plans, four of the five developers, including Petitioners, were either forced into foreclosure and bankruptcy to be picked up by Koll, and two actually were forced to sell to Koll at distressed prices. (Petition p. 4)¹⁰

II

THE AGENCY LACKED STATUTORY AUTHORITY FOR ITS ACTION AND HENCE HAS NO IMMUNITY

Since there is a risk that public power will be exercised for private benefit, policies displacing competition must be clearly and affirmatively expressed. *Hoover v. Ronwin*, 467 U.S. 1268, 104 S.Ct. 3564 at 20004 (1984). The *Parker* rule, as developed in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed. 26 (1985), and elsewhere holds that an action done by the state or authorized by the state is immune from antitrust liability. Crucial to this rule, as it applies to redevelopment agencies, is the limitation that the legislature must have

¹⁰ Petition, Appendices G and H (A-130-158). Petitioners Chapter XI proceeding (A-151).

intended to displace competition and that the challenged action must be authorized or contemplated, or foreseeable or "necessary and reasonable consequence of engaging in the authorized activity." *Town of Hallie, supra*; *Scott v. City of Sioux City*, 736 F.2d 1207, 1211 (8th Cir. 1984).

Town of Hallie *supra* requires that there be an *express limitation of powers* (Petition p. 8). The distinctions between this case and *Kern Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir.) *cert. denied*, 5/16/88 (C-4) and the reason certiorari was denied is that the challenged conduct in that action was not expressly prohibited, as in the instant action, there was only a general policy statement to wit: "*prohibition against waste and unreasonable use of water*"; and no conspiracy was alleged between a government official and private developer to restrain trade.

The California legislature requires 2 conditions before redevelopment agency anti-competitive action is authorized: (1) a finding of active urban blight; (2) that private enterprise cannot reasonably be expected to alleviate it. *Emmington and Regus, supra*. (Petition, pp. 10-11.)¹¹ *Emmington* at p. 497 states:

"Before a project area can properly be selected for redevelopment under the Community Redevelopment Law, it must be blighted. *In fact, the blighted condition of the area is the very basis of the redevelopment agency's jurisdiction to acquire the property by eminent domain and expend public funds for its redevelopment.* (cases omitted) The term 'blight' has never been defined with precision, nor can it be. However, the Legislature and courts have provided some guidelines. A two-part test is required to substantiate a finding of blight: First, the area must constitute a 'serious physical, social, or economic burden on the community which cannot reasonably be expected to be reversed or alleviated by private enterprise acting alone.' Secondly, one of the characteristics of blight as set out in Health and Safety

¹¹ H&S Section 33030, 33031 (C-4); 33032; 33037(b); 33352 (Petition, Appendix A-188-190); 33368 (Municipal Respondent's Opposition Brief, Appendix A-6).

Code sections 33031 or 33032 must exist. (Health & Saf. Code, § 33030, *italics added.*)” (Emphasis added)

Here, Petitioner and 4 other developers, pursuant to H&S Section 33037(b), without public participation or assistance, acquired, planned, financed, cleared and improved their land and eliminated blight (SAC, ¶ 20, A-42-43). *Regus*, *supra* p. 980.

There is no qualification, policy or statement in any statute, or case law providing that, as the Agency contends, the Agency is authorized to commit anti-competitive acts if government provides the necessary infrastructure, public improvements or public parking facilities even though private enterprise used its own funds to develop their buildings, purchased at fair market value without government subsidy, and pays for their portion of the parking facility.¹²

Neither requirement of the statutory conditions, were met by the Agency in adopting the 1983 amended plan. Respondent Agency never, in its Brief, addressed these issues of the controlling case law such as *Emmington*, *supra*, at 497; *Regus*, *supra*, at 980-983, which clearly restrict Agency authority and power to commit anti- competitive conduct without such findings. *Cine 42nd Street Theatre Corporation v. The Nederlander Organization*, 790 F.2d 1032 at 1036, cited by Respondent Agency also required a finding of blight before agency action was authorized. Thus, there was no reason why a monopoly to Koll was necessary to redevelopment where displacement of competition was not authorized, *Corey v. Look*, 641 F.2d 32 at 37 (1st Cir. 1981), and in fact expressly prohibited.

Thus, the Ninth Circuit decision is not consistent with the *Parker* doctrine as developed by *Town of Hallie*, *supra*, and in other federal jurisdictions. Without compliance with established state action prerequisites there can be no immunity from Sherman Act violations. Respondent Agency has cited no case holding that Sherman Act violations can be remedied by state corrective procedures with a 60-day time limit.

¹² SAC ¶ 62, A-54, SAC par. 55 A-52.

III

**THE GRANTING TO KOLL OF COMPLETE MARKET
POWER AND EXCLUSIVE MONOPOLY IN PARKING
DOES NOT INCREASE COMPETITION. PETITIONER
AND THE OTHER DEVELOPERS HAVE SUSTAINED
AN ANTITRUST INJURY**

The Ninth Circuit has held in *Aydin Corp. v. Ferol Corp.*, 718 F.2d 897 at 907 (1983) that "whether a decrease in competition occurred and whether it was caused by the defendants' conduct are *factual matters* which, if disputed, must be resolved by the trier of fact." (Emphasis added.)

This requirement for a factual development was directed in both Supreme Court cases cited by respondent. *Brunswick Corp. v. Pueblo Bowel-O-Mat Inc.*, 429 U.S. 477, 97 S.Ct. 690 (1977); and *Cargel Inc. v. Manfort of Colorado, Inc.*, ____ U.S. ____, 197 S.Ct. 484, 492 L.Ed. 2d 427 (1986) where after full factual development and trial the proof did not establish that defendant committed any predatory conduct which injured competition.

In the instant action, Koll, for the agreed purpose of destroying competition and monopolizing the market, solicited the Agency director to administratively deny Petitioner and all other developers essential parking to operate their business (SAC, ¶ 67 (A-55-56)), yet the respondent frivolously and insincerely argues that Koll increased competition by its actions. The judicially noticed facts of the foreclosure, bankruptcy and forced sale of the existing businesses in the area by reason of the conspiracy should at least at this stage of the pleadings lead to an inference of antitrust injury (Petition, Appendices "G" and "H").

IV

THE ACTIVE PARTICIPATION BY AN AGENCY OFFICIAL IN A CONSPIRACY WITH A PRIVATE DEVELOPER IS NOT ENTITLED TO NOERR-PENNINGTON IMMUNITY NOR DOES IT CONSTITUTE PROTECTED POLITICAL ACTIVITY, THAT CONDUCT BARRED ACCESS TO THE ADMINISTRATIVE AND JUDICIAL PROCESSES

A. The Detailed Allegations Of Koll Planning And Secret Agreements Combined With Agency Implementation And Deception Show Unprotected Activity.

The Ninth Circuit decision granting Noerr-Pennington immunity conflicts with Supreme Court, other circuits and its own decisions. Supreme Court from *Parker v. Brown*, 317 U.S. 341, 351 (1943) through the current decision in *Allied Tube & Conduct Corporation v. Indian Head Inc.*, 486 U.S.____; 108 S.Ct 1931, 1938 fn. 7 (1988),¹³ holding that where the municipal official becomes a “*participant* in a private agreement or combination of others for restraint of trade” there can be no antitrust immunity for such conduct (*Parker*, p. 351.) which thus effectively bars access to agencies and the courts.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 at 513, 514 (1972) is controlling in this action stating at 513:

“Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of ‘political expression.’ ”

at 514:

“It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.”

The other circuits follow this Supreme Court authority *Affiliated Capital Corporation v. City of Houston*, 735 F.2d 1555 at 1566, found no Noerr-Pennington immunity entitlement where

¹³ Supplemental Brief p. 4 and 5.

the city official actively participated and, as in the instant action, vigorously orchestrated the conduct restraining trade. (*Scott v. City of Sioux City, supra*, at 1214, 1215.)

By reason of the conspiracy with the agency director petitioners were denied legitimate access to the agency and courts.

Regardless of Koll's characterization of factual findings by the district or appellate courts, on this appeal of a grant of motion to dismiss, the allegations of the Second Amended Complaint must be directly considered. Those allegations do not allege a pattern of legitimate public lobbying of government officials, legislative or otherwise. Koll contends it only sought publicly to build a building but the allegations of the SAC state much more. They do set forth a purposeful illegal scheme to use secret dealing with Agency officials to violate state law to destroy existing businesses and to monopolize. (SAC par. 67 A-55-56)

The agency acted in the commercial arena of office development and for that reason alone Koll's actions were unprotected (Supplemental Brief p. 8, 9)

Koll essentially contends that it can solicit illegal conduct with the active participation of the Agency director, and just because it gets it, is immune from antitrust liability. Indeed there can be no *Noerr-Pennington* immunity, in this case, because respondents claims of state action immunity have failed.

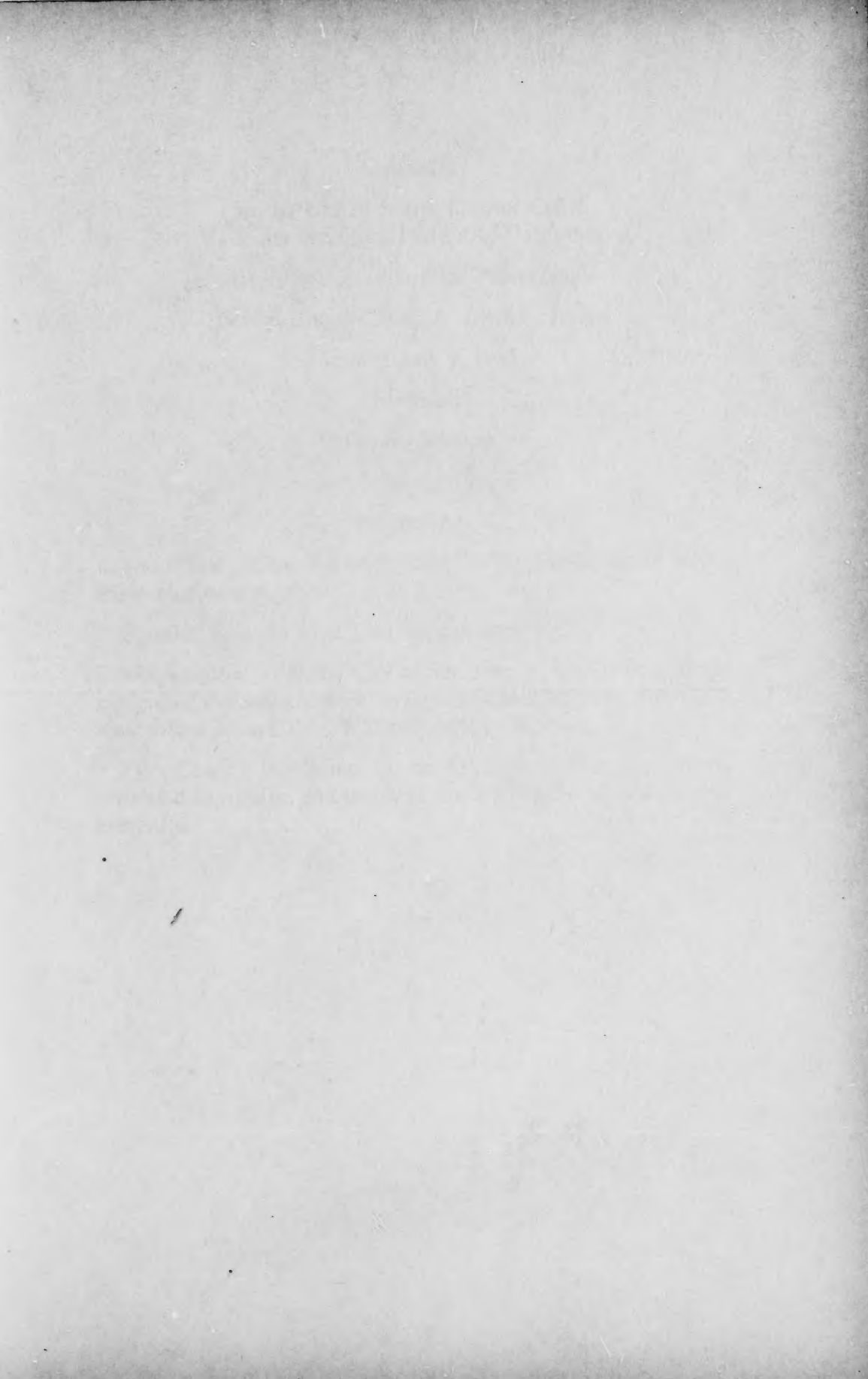
CONCLUSION

Respondents opposition is based on the erroneous and sham defenses that Agency anti-competitive activities were authorized by the state legislature, Koll's actions were legitimate political lobbying which is privileged, and that the detailed allegations stated herein were merely conclusory. The Ninth Circuit decision was based on these erroneous findings and its erroneous views of applicable law and therefore this petition should be granted and the decision vacated.

Respectfully submitted,

HERBERT F. KAISER

Attorney for Petitioners
David A. Boone, et al.





Appendix

In the United States District Court
For the Northern District of California

Reporter's Transcript of Proceedings
Before Hon. William A. Ingram, Judge

Tuesday, July 9, 1985

(Motions)

Morning Session

San Jose, California

Proceedings

The Clerk: Case Number C 84-20772, David Boone versus
Redevelopment Agency.

Counsel, will you state your appearances, please?

Mr. Khourie: For the City of San Jose, Your Honor, and the
associated Defendants there, myself, Michael Khourie, Jim Gilli-
land, Mark Jansen, Mr. Wallace and Mr. Reiners.

The Court: It's going to be 15 days to file the second
amended complaint, and then you can brief in the normal manner
thereafter.

Reporter's Transcript of Proceedings

Before: Honorable William A. Ingram, Judge

Thursday, November 21, 1985

(Motions)

Morning Session

San Jose, California .

Proceedings

The Clerk: Case No. C 84-20772, Boone Versus
Redevelopment.

Counsel: May we have your appearances?

Mr. Khourie: Michael Khourie, Jim Gilliland and Mark Jansen for Plaintiffs—for defendants City of San Jose, San Jose—City of San Jose Redevelopment Agency, *and Mr. Taylor* (Phonetic).

§ 33030. Existence of blighted areas

It is found and declared that there exist in many communities blighted areas which constitute either physical, social, or economic liabilities, . . . requiring redevelopment in the interest of the health, safety, and general welfare of the people of such communities and of the state.

. . . A blighted . . . area is one which is characterized by one or more of those conditions set forth in Sections 33031 . . . or 33032, causing a reduction of, or lack of, proper utilization of the area to such an extent that it constitutes a serious physical, social, or economic burden on the community *which cannot reasonably be expected to be reversed or alleviated by private enterprise acting alone.*

(Amended by Stats.1976, c. 1336, pp. 6054, 6055, § 1.)

§ 33031. Blighted area; unfit or unsafe buildings

A blighted area is characterized by the existence of buildings and structures, used or intended to be used for living, commercial, industrial, or other purposes, or any combination of such uses, which are unfit or unsafe to occupy for such purpose and are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime because of any one or a combination of the following factors:

- (a) Defective design and character of physical construction.
- (b) Faulty interior arrangement and exterior spacing.
- (c) High density of population and overcrowding.
- (d) Inadequate provision for ventilation, light, sanitation, open spaces, and recreation facilities.
- (e) Age, obsolescence, deterioration, dilapidation, mixed character, or shifting of uses.

(Added by Stats.1963, c. 1812, p. 3679, § 3.)

No. 87-1433. Kern Tulare Water District, Petitioner v. City of Bakersfield, California.

May 16, 1988. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Same case below, 828 F2d 514.

Justice White, dissenting.

This Court has previously held that a municipality is immune from antitrust liability under the state action exemption if it can demonstrate that "it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Hallie v Eau Claire*, 471 U.S. 34, 40 85 L Ed 2d 24, 105 S Ct 1713 (1985); see *Parker v Brown*, 317 US 341, 87 L Ed 315, 63 S Ct 307 (1943). It is not necessary that the legislature explicitly state that it intends municipalities to engage in anticompetitive conduct pursuant to the state policy; it is enough that "anticompetitive effects logically would result from [the] broad authority to regulate." *Hallie*, supra, at 42, 85 L Ed 2d 24, 105 S Ct 1713. From these principles, I had thought it clear that an antitrust violation would be established by showing that a municipality restrained trade by acting contrary to the clearly articulated state policy. Yet the Ninth Circuit has held here that ordinary "abuses" by local authorities in the field generally covered by the state policy are matters for state tribunals and not concerns of federal antitrust policy. 828 F2d 514, 522 (1987).

The mischief of this unwarranted expansion of the state action exemption can be seen in the facts of this case. **All agree that an integral part of California's state water policy is its prohibition against waste and unreasonable uses of water.** 828 F2d, at 519 (citing Cal Court, Art. 10, § 2; Cal Water Code Ann § 106.5 (West 1971)). Furthermore, the state policy expressly encourages municipalities to transfer water rights so as to improve the efficiency of water use. Cal Water Code Ann § 109 (West Supp. 1987). Here, petitioner water district alleged that respondent city controlled sources of water exceeding its annual needs, was in the business of reselling the surplus water for rural irrigation, and had entered a 35-year contract with petitioner, providing that petitioner would pay respondent \$400,000 per year for 20,000 acre-

feet of water per year. The water district alleged that, contrary to past years under the contract, the city refused to allow the district to transfer excess water to third parties, who evidenced their need for it by their willingness to pay. The city sent a letter explaining its stance as necessary to effectuate the contractual provision requiring that the water be used only by the district. Because the city refused to allow the district to transfer the water to third parties and because the district did not need the water, it eventually ran into the state aqueduct, either to be wasted as run-off into the sea or to flow to communities outside of the Kern County water basin. Whatever the fate of the dumped water, petitioner alleges that the city prevented the transfer to maintain its control of the resale market for irrigation water in Kern County.

The irony of the Ninth Circuit's decision is its bestowing of antitrust immunity for such conduct based on a state statutory scheme, which is intended to promote efficient use of water and prevent its waste. It seems questionable that the contractual prohibition of transfer rights, possibly resulting in the waste of the water and certainly preventing an efficient transfer, was the kind of action that the California legislature contemplated when it enacted the statutory scheme. *Hallie*, *supra*, at 44, 85 L Ed 2d 24, 105 S Ct 1713. Municipal actions that contravene express limits in the state policy would not seem to be taken pursuant to a clearly articulated policy and thus would not seem to be shielded by the state action exemption. The Ninth Circuit's characterization of the alleged violation of state policy as an ordinary error or occasional abuse seems insufficient to insulate the municipality from liability for action that restrains competition. There seems little room in the Sherman Act's prohibition of restraint of trade for such a forgiving rule. Because I do not believe that every municipality deserves one free anticompetitive bite, I would grant certiorari.

ANTITRUST LAW

Cite as 88 Daily Journal D.A.R. 6102
Supreme Court of the United States

Kern Tulare Water District v. City of
Bakersfield, California

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

No. 87-1433. Decided May 16, 1988

The petition for a writ of certiorari is denied.

Justice White, dissenting.

828 F. 2d 514, 522 (1987).

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